PD-0563-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/20/2017 12:14 PM
Accepted 11/20/2017 4:37 PM
DEANA WILLIAMSON
CLERK

No. PD-0563-17
COURT OF APPEALS CAUSE NO. 03-15-00332-CR

FILED
COURT OF CRIMINAL APPEALS
11/20/2017
DEANA WILLIAMSON, CLERK

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

TERRI REGINA LANG — Appellant

v.

STATE OF TEXAS — Appellee

Appeal from Burnet County

APPELLANT'S BRIEF

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INDEX OF AUTHORITIES

U.S. Supreme Court:

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APPELLANT'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant offers this brief on the merits:

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from a judgment of conviction by a jury for organized retail theft, with punishment assessed by the court. (I C.R. at 41-42).

Judge/Court: Judge Evan Stubbs, 424th District Court, Llano County. (I C.R. at 41-42).

Pleas: Not Guilty. (I C.R. at 41) (III R.R. at 6).

Trial Court Disposition: The jury found Appellant guilty of organized retail theft

(I C.R. at 41) (IV R.R. at 81-82). Because Appellant elected to have the court assess her sentence, (II R.R. at 7) (IV R.R. at 82), the court ordered a presentence investigation report, (IV R.R. at 82) (V R.R. at 6-7), held a sentencing hearing (V R.R. at 6-26), and sentenced Appellant to twenty months in the State Jail Division of the Texas Department of Criminal Justice. (V R.R. at 22-23).

Appellate Court Disposition: The Austin Court of Appeals held "that the statutory language permits only one reasonable understanding concerning whether the statute requires proof that the defendant acted with others in committing this offense—it does not—and whether the offense criminalizes the underlying act of theft—it does." *Lang v. State*, 03-15-00332-CR, 2017 WL 1833477 at *7 (Tex. App.—Austin May 5, 2017) (mem. op., not designated for publication), *petition for discretionary review granted* (October 4, 2017) .

ISSUES PRESENTED

ISSUE ONE: May this Court adhere to a rule that refuses to allow the consideration of legislative history to interpret a statute unless the statute is ambiguous, when the Legislature states that legislative history may be considered whether or not a statute is ambiguous?

a. Must *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) and its progeny be overruled to the extent they conflict with Texas Government Code Section 311.023, which Texas Penal Code Section 1.05(b) makes applicable to the Penal Code?

ISSUE TWO: Does the organized retail theft statute admit of more than one reasonable interpretation with respect to whether the statute may be violated by a solitary actor committing ordinary shoplifting, and does consulting the plain language alone lead to absurd results that the legislature could not possibly have intended?

ISSUE THREE: May a shoplifter violate the organized retail theft statute by committing ordinary shoplifting while acting alone?

STATEMENT OF FACTS

1. The Incident

In October 2013, Appellant was shopping alone at HEB when Candace Griffith, a long-time HEB employee, found Appellant's shopping habits unusual and decided to observe. (III R.R. at 9-11). Griffith noticed Appellant putting her groceries in reusable bags rather than the basket itself, and taking an inordinate amount of time to shop. (III R.R. at 11; 16).[1] After watching for about an hour, Griffith followed Appellant to the checkout lane to bag groceries "for the person in front of [Appellant] to see what was coming out of [Appellant's] basket." (III R.R. at 12-13). By then, Appellant had "several [reusable bags] inside of the basket and...one was tied to the right-hand side of the basket away from the checkout." (III R.R. at 12).

[1] Griffith testified that when Appellant was putting the items in her reusable bags, Appellant "was just kind of looking around." (IV R.R. at 7).

At the checkout counter, Appellant placed the reusable bags[2] in her shopping cart onto the conveyor belt, but not the reusable bag tied to the cart. (III R.R. at 14-17). After paying for the items in the bags on the conveyor belt, Appellant made her way out the door with an open Red Bull in her hand,[3] and Griffith and a manager stopped Appellant by the coke machines. (III R.R. at 16-17; 29) (IV R.R. at 10). Returning inside with Appellant, Griffith totaled up the value of the items for which Appellant did not pay, which came to $565.59 before sales tax. (III R.R. at 17-18; 22) (State's Ex. 1 in VI R.R.) (State's Ex. 3 and State's Ex. 4). The police were called, and an officer ran Appellant's debit card, which showed Appellant had around $800. (III R.R. at 32) (IV R.R. at 17-18). Still, Appellant neither offered to pay for the items nor did HEB ask her to pay for them, and because other items were found in her cart, charges were brought for organized retail theft of property with a value greater than $500 but less than $1,500, a state jail felony. (III R.R. at 32) (IV R.R. at 30-31) (I C.R. at 4).

2. Trial

A. Motion for Directed Verdict

After the close of the evidence, Appellant moved for a directed verdict. (IV

[2] It appears Appellant did not pay for at least one of these bags. (IV R.R. at 16-17).
[3] Griffith saw Appellant place Red Bulls in the bag tied to the side of the cart, as well as open one of Red Bulls and drink it. (IV R.R. at 10-11).

R.R. at 38-48). Citing to the legislative history and noting a dearth of case law interpreting the organized retail theft statute, Appellant argued that "what elevates ordinary shoplifting-type theft to organized retail theft is the organized activity of participants in a group", and that there was "not a scintilla of evidence here of such organization or group." (IV R.R. at 38-40). Appellant argued that, "[i]f my motion is defeated, then simply stealing anything from a retail store, shoplifting, is always organized retail theft", and consequently, "there is no point in having the regular 31.03 theft statute for shoplifting on the books." (IV R.R. at 40). Appellant based this conclusion in part on discerning two elements in the first sentence of subsection (b) of the statute: the "first element is 'conduct, and promote, and facilitate an activity'. There has to be an activity. The sub-element is 'in which the defendant received, and possessed, and concealed, and stored retail stolen merchandise.'"[4] Appellant concluded: "[b]ecause there is no evidence of a ring, because there's no evidence of organized activity, and because there is not even a scintilla of evidence of group conduct or offense, I move for a direct verdict on the charge." (IV R.R. at 40-41).

[4] Appellant's counsel must be reading from the indictment, which charged in the conjunctive although the statute is worded in the disjunctive. (I C.R. at 4); Tex. Pen. Code § 31.16(b).

The State responded that the legislature could have included this offense under the organized criminal activity statute[5] if that was their intent, and it is "common knowledge" that there is a "great amount of retail theft", such that the purpose of the organized retail theft statute is to punish such conduct more severely than under the ordinary theft statute. (IV R.R. at 41-42).

The judge noted that he had "not heard of any evidence that would lead me to believe that [Appellant] was, in fact, acting in conjunction with or with the agreement of some other party", and invited the State to address Appellant's argument that organized retail theft cannot be committed alone. (IV R.R. at 44). In response, the State argued that the statute itself does not require concerted action, except under subsection(d),[6] and "submit[ted] to the Court [that] someone [who] goes into a retail establishment and has a plan to steal and does so in a planned manner" can be said to have engaged in "organized" activity. (IV R.R. at 44). Responding to a query from the court about this last argument, the State suggested that the legislature increased the punishment range to "give extra protection to retail establishments, but in any case thieving always involves some kind of organized thought." (IV R.R. at 45). Noting he had his "own personal opinion about this statute, but – and I think the Court probably knows what it is",

[5] Tex. Pen. Code § 71.02 (penalizing certain offenses committed by persons connected with a "combination" or its profits, or a criminal street gang).
[6] Tex. Pen. Code § 31.16(d).

the prosecutor noted he was "bound by the law as [he] see[s] it and that's how we're pursuing that." (IV R.R. at 45).

The judge noted Appellant's argument was "a very good argument to [make]", and that he was "not sure that it makes much rational sense in [his] mind that we would increase the punishment range simply based on the fact that it's…some retail establishment". (IV R.R. at 45). However, despite the argument making "some very logical sense to [him]", the judge decided the language of the statute does not "require an additional person to be involved." (IV R.R. at 45). Regarding the meaning of "organized", the judge observed that "if 'organized' does not require more than one person to be involved, then the simple fact that reusable bags…[were] used…would imply to me that there was a plan". (IV R.R. at 46). Responding to the State's argument regarding subsection(d), Appellant observed that part of that subsection "elevates [the level of the offense] if one has an organizing role, supervising role, a financing role, or a managing role," and thus, "(d) underscores [Appellant's] argument": thus, "organized retail theft always, by the legislative history and by the language of the statute, always involves a group of people." (IV R.R. at 47). Nevertheless, the judge denied the motion for directed verdict. (IV R.R. at 48).

B. Charge Conferences

During the informal charge conference, Appellant requested the "submission

of a lesser included offense of theft under 31.03." (IV R.R. at 51). The prosecutor responded that "I don't believe that theft, just theft, would be a lesser included of this particular statute. Now, theft less than $500 would be, I think, but I'm not aware of any evidence to suggest that the amount is less than $500." (IV R.R. at 51). The judge asked for clarification: "[h]ow would theft of less than $500 be a lesser included of this offense if theft between $500 and $1,500 were not?" (IV R.R. at 51). The prosecutor clarified that "the way this statute is read there's nothing in here in the indictment that has the same elements of theft per se." (IV R.R. at 52). The judge asked which element was not included in organized retail theft, and the prosecutor responded: "[u]nlawfully appropriated without the consent of the owner, et cetera, et cetera. I mean, it's just not there." (IV R.R. at 52). Instead, "if there's a suggestion that…we haven't proven $500…then…a lesser of organized retail theft as a Class A misdemeanor would be a lesser[-included offense]". (IV R.R. at 52).

Appellant argued that "based on the legislative history of organized retail theft, based on the legislative history alone, theft is a lesser included." (IV R.R. at 56). The judge responded: "[i]t seems that theft would have to be a lesser included of organized retail theft. I mean for it to be organized retail theft there has to be theft; however, my understanding on the case law on that is that…the lesser included must contain each and every element of the higher level offense or

the indicted charge". (IV R.R. at 56). Thus, the judge observed that "it seems…that this [organized retail theft] technically involves stolen property as opposed to theft of property theoretically". (IV R.R. at 56). Because one person "could conduct a theft and you could be guilty of organized retail theft simply for some version of possession of stolen property", the judge did not "see element for element that the elements of the underlying theft are necessarily included in the indictment for organized retail theft." (IV R.R. at 57). The judge observed that he was "not certain that it [the organized retail theft statute] requires proof of an actual theft as to the defendant that's been indicted", (IV R.R. at 58), and because he did not "find that the elements of organized retail theft necessarily included all the elements of an underlying theft", he denied the request for simple 31.03 theft as a lesser-included offense. (IV R.R. at 57). Accordingly, the judge removed all definitions from the charge that corresponded to theft under Texas Penal Code Section 31.03. (I C.R. at 34-40) (IV R.R. at 54-59).

Thus, the charge submitted to the jury contained four elements that the jury was required to find beyond a reasonable doubt to convict Appellant:

(1) the defendant, in Burnet County, Texas, on or about the 2nd day of October, 2013, did then and there intentionally conduct or promote or facilitate an activity;

(2) in which the defendant received or possessed or concealed or stored stolen retail merchandise;

(3) the stolen retail merchandise being groceries, herbal supplements, energy drinks, and animal treats; and

(4) the total value of the merchandise involved in the activity was $500.00 or more but less than $1,500.00. (I C.R. at 37).

C. Closing Arguments and Verdict

During the State's closing argument, the prosecutor asked, rhetorically: "Now, did [Appellant] conduct an activity?" (IV R.R. at 64). Yes, he said, because Appellant "was putting items in that bag that was strapped to the side of her cart." (IV R.R. at 64). As for whether Appellant possessed stolen retail merchandise, he stated: "Well, she certainly possessed it, didn't she? And was it stolen? Well, when she walked out of that store without paying for it…the property was stolen." (IV R.R. at 64).

The jury agreed and found Appellant guilty of organized retail theft. (IV R.R. at 81-82).

SUMMARY OF THE ARGUMENT FOR ISSUE THREE[7]

[7] Appellant presents the issues in reverse order to promote efficiency because, if the Court decides that the organized retail theft statute unambiguously does not allow a shoplifter, acting alone, to violate the statute by committing simple shoplifting, then it is unnecessary to address whether the statute is ambiguous and whether *Boykin* and its progeny should be modified or overruled.

ISSUE THREE: May a shoplifter violate the organized retail theft statute by committing ordinary shoplifting while acting alone?

The most straightforward reason for concluding that the Court of Appeals erred in determining that the organized retail theft statute "criminalizes the underlying theft" is that this makes "simple" theft a lesser-included offense of organized retail theft. However, applying the appropriate test yields the conclusion that theft is not a lesser-included offense of organized retail theft. As such, it is impossible for a person to violate the organized retail theft statute merely by committing theft, because a person necessarily cannot commit a greater offense by committing another offense that is not a lesser-included offense of the greater. Because it is undisputed that if Appellant committed anything, she committed shoplifting by acting alone—that is, that she committed simple theft—Appellant's conviction for organized retail theft necessarily cannot stand.

Then, the legal sufficiency analysis of the Court of Appeals is flawed: it ignores the Legislature's plain language by turning "stolen" into "steals", fails to respect the connection in the statute amongst the elements, and is self-contradictory.

ARGUMENT FOR ISSUE THREE

How can the organized retail theft statute "criminaliz[e] the underlying

theft", *Lang*, 2017 WL 1833477 at *7, if the underlying theft, committed by a solitary actor, is not a lesser-included offense of organized retail theft?

A. Simple theft is not a lesser-included offense of organized retail theft

1. The general test for lesser-included offenses

"An offense is a lesser included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged". Tex. Code Crim. Proc. art. 37.09(1).[8] To determine whether this is the case, we apply a "cognate pleadings" approach. *State v. Meru*, 414 S.W.3d 159, 162-163 (Tex. Crim. App. 2013). Under that approach,

> "An offense is a lesser-included offense of another offense, under Article 37.09(1) of the Code of Criminal Procedure, if the indictment for the greater-inclusive offense either: 1) alleges all of the elements of the lesser-included offense, or 2) alleges elements plus facts (including descriptive averments, such as non-statutory manner and means, that are alleged for purposes of providing notice) from which all of the elements of the lesser-included offense may be deduced. Both statutory elements and any descriptive averments alleged in the indictment for the greater-inclusive offense should be compared to the statutory elements of the lesser offense. If a descriptive averment in the indictment for the greater offense is identical to an element of the lesser offense, or if an element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive offense, this should be factored into the lesser-included-offense analysis in asking whether all of the elements of the lesser offense are contained within the allegations of the greater offense."

[8] The statute contains other definitions of lesser-included offenses not relevant here.

Id. at 162 (quoting *Ex parte Watson*, 306 S.W.3d 259, 273 (Tex. Crim. App. 2009)).[9]

So, we look to the indictment for organized retail theft to determine if it "alleges either all of the elements of [theft], or elements and facts from which all of the elements of [theft] may be deduced." *Meru*, 414 S.W.3d at 163.

2. The indictment

The indictment alleges that on or about October 2, 2013, in Burnet County, Appellant "did then and there intentionally conduct and promote and facilitate an activity in which the defendant received and possessed and concealed and stored stolen retail merchandise, to wit: groceries, herbal supplements, energy drinks and animal treats, and the total value of the merchandise involved in the activity was greater than $500 but less than $1,500." (I C.R. at 4).[10]

3. Theft

"A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Pen. Code § 31.03(a). "Appropriation of property is unlawful if: (1) it is without the owner's effective

[9] The first part of this two-part test determines whether one offense is a lesser-included of another; the second part determines whether the lesser-included should have been submitted. Only the first part is relevant here.

[10] The charge distinguished four elements within this indictment. (I C.R. at 37) (IV R.R. at 49-50). Element three in the charge is, however, not part of the statutory offense: the statute requires the State to prove that the property is stolen retail merchandise, but the State bound itself through element three to prove more—the specific type of retail merchandise that was stolen. Tex. Pen. Code § 31.16(b); (I C.R. at 37).

consent". Tex. Pen. Code § 31.03(b)(1).[11] "Appropriate", "deprive", and "effective consent" are statutorily defined. Tex. Pen. Code § 31.01(2)-(4). The amount of property stolen, among other things, will determine the level of the offense. Tex. Pen. Code § 31.03(e).

4. Comparing the indictment to theft

a. Elements

Meru requires us to decide whether the elements of theft are alleged within the indictment, or whether the indictment alleges elements and facts from which we can deduce the elements of theft. *Meru*, 414 S.W.3d at 163. It needs little analysis to see that the elements of theft are not alleged in the indictment: the indictment does not allege Appellant unlawfully appropriated property, that she did so without the owner's effective consent, or that she did so with intent to deprive the owner of property. (I C.R. at 4); Tex. Pen. Code § 31.03(b)(1). The indictment does not even allege who the owner is. *See Byrd v. State*, 336 S.W.3d 242, 252, n. 48 (Tex. Crim. App. 2011) ("However, the Code of Criminal Procedure, as a matter of state law, requires the State to allege the name of the owner of property in its charging instrument…Although the *name* of the owner is not a substantive element of theft, the State is required to prove, beyond a reasonable doubt, that the *person* (or entity) alleged in the indictment as the owner is the same person (or

[11] The definitions found in 31.03(b)(2) and 31.03(b)(3) are not relevant here. Tex. Pen. Code § 31.03(b)(2); Tex. Pen. Code § 31.03(b)(3).

entity)—regardless of the name—as shown by the evidence….[at n. 48] a theft indictment or information must both name the owner and describe the property as both elements constitute the gravamen of the offense.") (emphasis in original). Most telling is the fact that the organized retail theft statute requires the property to have already been stolen at the time the offense is committed—hence, unlawful appropriation (under 31.03(b)(1), at least) and the rest are necessarily excluded from the outset. Tex. Pen. Code § 31.16(b)(1). Put another way, while no doubt a retail theft must have occurred for organized retail theft to be committed, the indictment, like the statute, assumes the theft has already occurred. (I C.R. at 4); Tex. Pen. Code § 31.16(b).

b. Functional-equivalence

However, "the elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment." *Meru*, 414 S.W.3d at 162. This "functional-equivalence concept", *Id*., requires courts to examine the elements of the lesser offense and decide whether they are "functionally the same or less than those required to prove the charged offense." *McKithan v. State*, 324 S.W.3d 582, 588 (Tex. Crim. App. 2010) (citing *Farrakhan v. State*, 247 S.W.3d 720, 722-723 (Tex. Crim. App. 2008)). Courts consider whether the "element of the lesser offense may be deduced from a descriptive averment in the indictment for the greater-inclusive

offense". *McKithan*, 324 S.W.3d at 587 (quoting *Ex parte Watson*, 306 S.W.3d at 273)). In this analysis, functional-equivalence "appears to be synonymous with the concepts of 'necessary inclusion' or 'subsumption of elements.'" *Id*. at 588, n. 15 (quoting *Evans v. State*, 299 S.W.3d 138, 143 (Tex. Crim. App. 2009). "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck v. United States*, 489 U.S. 705, 719, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989) (quoting *Giles v. United States*, 144 F.2d 860, 861 (9th Cir. 1944)).

There are two questions, then. First, does any part of the indictment "inherently" supply the missing element? *See Salazar v. State*, 284 S.W.3d 874, 875, 878 (Tex. Crim. App. 2009) (alleging "habitation" in the indictment inherently provided notice that entry is forbidden for purposes of determining if criminal trespass is a lesser-included offense of burglary of a habitation). Second, do any of the descriptive averments in the indictment that are alleged for providing notice supply the missing element? *Ex parte Watson*, 306 S.W.3d at 273.

(1) No inherent notice of missing elements

Missing from the indictment in this case are the elements of unlawful appropriation, the identity of the owner, lack of the owner's effective consent, and intent to deprive the owner of property. (I C.R. at 4); Tex. Pen. Code § 31.03(a); Tex. Pen. Code § 31.03(b)(1); Tex. Code Crim. Proc. art. 21.08. These missing

elements cannot be implied from the indictment, however, if for no other reason than that the indictment, tracking the statute, requires the retail merchandise to be *already* stolen by the time the actor does anything with respect to it. (I C.R. at 4); Tex. Pen. Code § 31.16(b)(1). Sure—merely because stolen retail merchandise is involved there must have been a theft by someone somewhere at some time, so we know, from looking at the indictment (or the statute), that someone somewhere at some time must have "unlawfully appropriate[d] property with intent to deprive the owner of property", Tex. Pen. Code § 31.03(a), and must have done so without the owner's effective consent. Tex. Pen. Code § 31.03(b)(1). But we do not know from the indictment that *Appellant* did these things, since the merchandise must be already stolen by the time she does anything: the theft must have occurred before the accused gets involved—the retail merchandise must be "stolen"—so this necessarily excludes Appellant from the outset. Neither can we deduce the identity of the owner from the indictment. *Byrd*, 336 S.W.3d at 252, n. 48.

(2) Descriptive averments do not provide notice

Neither does the indictment allege elements plus facts from which the missing elements of theft may be deduced. *Meru*, 414 S.W.3d at 163. The only additional facts alleged that are not part of the statute are the specific items of retail merchandise alleged to have been stolen. (I C.R. at 4) ("groceries, herbal supplements, energy drinks and animal treats"). While providing notice to

Appellant of which items of retail merchandise were already stolen, Tex. Code Crim. Proc. art. 21.09 ("If known, personal property alleged in an indictment shall be identified by name, kind, number, and ownership. When such is unknown, that fact shall be stated, and a general classification, describing and identifying the property as near as may be, shall suffice."), *Byrd*, 336 S.W.3d at 252, n. 48 ("a theft indictment or information must both name the owner and describe the property as both elements constitute the gravamen of the offense."), these facts do not supply the missing elements noted above nor can we deduce those missing elements from these facts. *Meru*, 414 S.W.3d at 162. Alleging these particular descriptive averments is not the functional equivalent of alleging the elements of 31.03(a) theft. *See McKithan*, 324 S.W.3d at 589-590 & n. 20 (emphasizing that deducing an element of the lesser-included offense from a descriptive averment in the indictment for the greater describes the concept of functional-equivalence and does not change the "facts required" language of Article 37.09(1) to "facts deduced or inferred").

5. If the underlying theft is not a lesser-included offense of organized retail theft, then the organized retail theft statute cannot "criminalize the underlying theft"

The above shows that theft under 31.03(a), (b)(1) is not a lesser-included offense of organized retail theft as alleged in 31.16(b). This result may be "counterintuitive", but "the statutes bind us." *Meru*, 414 S.W.3d at 164, n. 2.

However, in response to Appellant's contention that the organized retail theft statute cannot be violated by an ordinary shoplifter, acting alone to commit shoplifting, the Court of Appeals effectively concluded that 31.03(a) theft is a lesser-included offense of 31.16(b) organized retail theft. *Lang*, 2017 WL 1833477 at *7. This is because the Court held the "offense criminalizes the underlying act of theft". *Id*. In other words, the Court of Appeals necessarily decided that "simple" theft is a lesser-included offense of organized retail theft. *Id*.

But, "[t]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." *Schmuck*, 489 U.S. at 719 (quoting *Giles*, 144 F.2d at 861). Since our law embraces this concept of "necessary inclusion", *McKithan*, 324 S.W.3d at 588, n. 15 (observing that the functional-equivalence concept "appears to be synonymous with the concepts of 'necessary inclusion' or 'subsumption of elements.'") (quoting *Evans*, 299 S.W.3d at 143), if "simple" theft under 31.03(a) is not a lesser-included offense of 31.16(b)(1) organized retail theft, then it is impossible for Appellant to be guilty of organized retail theft if she merely committed "simple" theft—and no one can seriously question that that is all she could have done. Thus, the conclusion of the Court of Appeals that the "underlying theft" is criminalized by the organized retail theft statute cannot be correct unless the "underlying theft" is a lesser-included offense of organized retail theft as alleged in

the indictment. *Schmuck*, 489 U.S. at 719; *McKithan*, 324 S.W.3d at 588, n. 15; *Evans*, 299 S.W.3d at 143. But an "underlying theft" as alleged in 31.03(a) and 31.03(b)(1)—which is the only type of theft that could apply to the facts of this case—is not a lesser-included offense of 31.16(b)(1) organized retail theft, as shown above.

Note that Appellant has been careful to confine her argument to 31.03(a) and 31.03(b)(1) theft. Since unlawful appropriation may also occur if "the property is stolen and the actor appropriates the property knowing it was *stolen by another*", Tex. Pen. Code § 31.03(b)(2) (emphasis added), it might be possible for theft relying on that theory of unlawful appropriation to fall under the organized retail theft statute.[12] But observe that this only supports Appellant's argument that organized retail theft cannot be committed by a solitary actor committing ordinary shoplifting: for the "underlying theft" to be "criminalized", to use the language of the Court of Appeals, the property must be "stolen" (already) "by another". Tex. Pen. Code § 31.03(b)(2). And, as a charge of 31.16(b)(2) organized retail theft was neither made nor warranted, a 31.03(b)(2) definition of unlawful appropriation would not be appropriate either: the property was not already stolen, and it was not stolen "by another". Tex. Pen. Code § 31.03(b)(2). And consider this: if

[12] Conceivably, this might be true only with respect to subsection (b)(2) of 31.16. Tex. Pen. Code § 31.16(b)(2) ("merchandise explicitly represented to the person as being stolen retail merchandise.").

31.03(b)(2) covers the same conduct as organized retail theft, why would the Legislature enact a new statute making an old crime a new one? Is it not plain that the Legislature was targeting something more than what was already criminalized—group activity, or at least something more than mere shoplifting?

B. Analysis of the Court of Appeals as it relates to the underlying theft[13]

The Court of Appeals dismissed Appellant's claim that the organized retail theft statute targets "post-theft activity, not a theft itself"—a view shared by the trial judge (IV R.R. at 56) ("it seems…that this [organized retail theft] technically involves stolen property as opposed to theft of property theoretically")—with this analysis:

> "Stolen" is the past participle of "steal." The Penal Code defines "steal" as "to acquire property or service by theft."…A person commits theft if she "unlawfully appropriates property with intent to deprive the owner of property."…Thus, the person who unlawfully appropriates retail merchandise also "possesses" stolen retail merchandise…("'Possession' means actual care, custody, control, or management.")…Appellant's commission of theft is covered by the statute. That the statute also addresses others who may come into contact with the stolen retail merchandise after the theft (those

[13] Since elsewhere Appellant must set forth detailed argument necessarily not the subject of briefing before the Court of Appeals, Appellant confines her attack on the reasoning of the Court of Appeals to its ultimate conclusion that simple theft is covered by the statute (and thus, by implication, is a lesser-included offense), and directs the Court to her brief before the Court of Appeals for a detailed analysis of the statute itself, if that becomes necessary. *See, e.g.*, *Ex parte Perry*, 483 S.W.3d 884, 911-912 (Tex. Crim. App. 2016) (taking note of and considering arguments made in the State's brief to the court of appeals); ***LaRue v. State***, 518 S.W.3d 439, 447, n. 8 (Tex. Crim. App. 2017) (taking note of the defendant's argument before the court of appeals).

> who receive, possess, conceal, store, barter, sell, or dispose of it) does not inevitably mean that the person who committed the act of theft that rendered the merchandise "stolen" is excluded.
>
> *Lang*, 2017 WL 1833477 at *7 (citations and footnote omitted).

Thus, the Court smuggles "theft" into "organized retail theft" by arguing in this fashion: (1) "steal" means "theft"; (2) "theft" means "unlawfully appropriate"; (3) unlawful appropriation requires possession. *Id*. Well and good, but the statute does not say "steal", but *stolen*. The Court of Appeals attempts to evade this by observing that "'Stolen' is the past participle of 'steal.'" *Id*. True enough, but it does not change the fact that the Legislature chose "stolen" rather than "steal", and we presume the Legislature acted intentionally: "steal" *is* the past participle of "stolen", *Id*., but "steal" is "not the word[] that the legislature *actually* used…[and we] presume that the legislature meant what it said." *Seals v. State*, 187 S.W.3d 417, 421 (Tex. Crim. App. 2005) (emphasis in original). And, even if we accepted the lower Court's analysis here, we could not then conclude with the Court that "Appellant's commission of theft is covered by the statute." *Lang*, 2017 WL 1833477 at * 7. This is because it is not enough simply to possess stolen retail merchandise, or to unlawfully appropriate property, or whatever: one must *intentionally conduct, promote, or facilitate an activity in which* one receives, possesses, conceals, stores, barters, sells, or disposes of stolen retail merchandise.

Tex. Pen. Code § 31.16(b)(1). The reasoning of the Court of Appeals seems to be that because a person who unlawfully appropriates property steals it, and must possess it to do so, that therefore Appellant has violated the statute by doing just that. *Lang*, 2017 WL 1833477 at * 7. But the statute requires a great deal more. Tex. Pen. Code § 31.16(b)(1).

Ultimately, the Court seems to have forgotten how much the statute requires when it performed its legal sufficiency analysis. The Court stated:

> The evidence in this case demonstrated that appellant unlawfully appropriated retail merchandise from HEB when she concealed various items in the reusable shopping bag tied to her shopping cart and attempted to leave the store without paying for the items. After committing the theft, she possessed stolen retail merchandise as she tried to leave the store with the unlawfully appropriated items.
>
> *Lang*, 2017 WL 1833477 at *7.

Simplified, this means: "Appellant stole" ("appellant unlawfully appropriated…when….") and after stealing possessed stolen retail merchandise ("After committing the theft, she possessed…as she tried to leave…."). In terms of the statute, the Court's analysis reads thusly: Appellant stole (conducted), then walked out the door (an activity) while possessing the stolen retail merchandise (in which she possessed stolen retail merchandise). But the reader easily sees how that does not fit the language of the statute: a person must intentionally *conduct an activity in which* she possesses stolen retail merchandise. Tex. Pen. Code §

31.16(b)(1). The three parts (conduct, activity, in which….) are all connected, but under the Court of Appeals' analysis the conduct is not related to the activity: the conduct (stealing) comes first, then the activity (walking out the door),[14] and finally, the possession of stolen retail merchandise. *Lang*, 2017 WL 1833477 at * 7.

Then there is the self-contradiction in the Court of Appeals' analysis. Having concluded that the "underlying theft" is criminalized by the statute—in effect, that simple theft is a lesser-included offense of organized retail theft—the Court conducts its legal sufficiency analysis by making the organized retail theft something that follows the underlying theft: "*After* committing the theft…." *Lang*, 2017 WL 1833477 at * 7 (emphasis added). But, the statute criminalized the underlying theft, did it not? *Id*.

SUMMARY OF THE ARGUMENT FOR ISSUE TWO

ISSUE TWO: Does the organized retail theft statute admit of more than one reasonable interpretation with respect to whether the statute may be violated by a solitary actor committing ordinary shoplifting, and does consulting the plain language alone lead to absurd results that the legislature could not possibly have intended?

[14] As noted in her petition for discretionary review, and as argued in her brief, Appellant does not think that "activity" means merely an act or action, nor, we may add, that that "conducts" means simply "does", but let us assume they do, for the sake of argument.

Legislative history may be considered when a statute is ambiguous or the plain language leads to an absurd result. If ambiguity merely requires polar opposite interpretations, the organized retail theft statute is classically ambiguous under *Lanford*. Otherwise, assuming the interpretation of "stolen" given by the Court of Appeals is reasonable, it conflicts with Appellant's reasonable interpretation of "stolen" as showing that the statute targets post-theft conduct or requires group activity.. Then, it is not hard to show that "activity" and "organized" are ambiguous.

Likewise, at least one absurd result follows from the interpretation of the Court of Appeals: every shoplifter will commit organized retail theft merely by continuing to walk to the car—and will continue to violate the statute anew merely by driving home and doing just about anything with the retail merchandise. Each of these actions will be violations of the statute, but that is plainly absurd.

Because the statute is both ambiguous and the plain language leads to absurd results, legislative history may, indeed must, be considered. Only one conclusion is possible after consulting that history: the organized retail theft statute does not target the ordinary shoplifter who does no more than shoplift alone, but rather targets theft rings. As a result, Appellant's conviction cannot stand.

ARGUMENT FOR ISSUE TWO

"A statute is ambiguous when it may be understood by reasonably well-informed persons in two or more different senses…On the other hand, a statute is unambiguous when it reasonably permits no more than one understanding." *State v. Schunior*, 506 S.W.3d 29, 34–35 (Tex. Crim. App. 2016) (citation and quotations omitted).

In relevant part, the organized retail theft statute reads: "A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of: (1) stolen retail merchandise". Tex. Pen. Code § 31.16(b)(1).

Appellant can show an ambiguity in this text, resulting in the need to consult legislative history, either under *Boykin*[15] or *Lanford*,[16] as understood by *Allen*.[17]

A. Ambiguity under *Lanford*

Lanford stated: "Indeed, we conclude that subsection (d) is classically ambiguous, as the polar interpretations of the court of appeals and the parties, set out previously, would suggest." *Lanford v. State*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993). The First Court of Appeals comments that, with this language, this Court "eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text." *Allen v. State*, 11 S.W.3d 474, 476 (Tex.

[15] *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991).
[16] *Lanford v. State*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993).
[17] *Allen v. State*, 11 S.W.3d 474, 476 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001).

App.—Houston [1st Dist.] 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001). The parties plainly took polar opposite positions here: Appellant claims the organized retail theft statute cannot be violated by an ordinary shoplifter acting alone, nor can it be violated merely by committing shoplifting; the State says group activity is not required, and the underlying theft can support a conviction. So, if *Allen* correctly interprets *Lanford*, then we have a classic ambiguity in Section 31.16, and extra-textual sources, including legislative history, should be consulted to resolve it.

B. Ambiguity under *Boykin*

But if something more than diametrically-opposed disagreement is required, then all Appellant needs to show is that Section 31.16 may be reasonably understood in more than one sense by well-informed persons. This is done easily enough: a person commits an offense under Section 31.16 if, and only if, the retail merchandise is already stolen. Tex. Pen. Code § 31.16(b)(1). Thus, all of the prohibited conduct identified in the statute is directed at doing something after the theft has already occurred. But the Court of Appeals disagreed, saying that a "person who unlawfully appropriates retail merchandise also 'possesses' stolen retail merchandise." *Lang*, 2017 WL 1833477 at *7. Now, Appellant thinks that interpretation is untenable: it means that a person commits organized retail theft by the act of stealing, but the statute requires the property to already have been

stolen by the time the person conducted, promoted, or facilitated the activity in which he received, possessed, concealed, stored, bartered, sold, or disposed of the retail merchandise. Tex. Pen. Code § 31.16(b)(1). Even the trial judge thought so: "it seems…that this [organized retail theft] technically involves stolen property as opposed to theft of property theoretically". (IV R.R. at 56). The statute does not say a person commits an offense if he does something (conducts, promotes, facilitates) with respect to an activity in which he *steals* retail merchandise, but rather, with respect to *stolen*—already stolen—retail merchandise. Surely Appellant's interpretation is not one that no reasonable person could hold, and let us assume for the sake of argument that the Court of Appeals' interpretation is also reasonable. That is an ambiguity under *Boykin*.

Or, let us take the meaning of the word "activity". Tex. Pen. Code § 31.16(b). The word is not defined in the statutes. After consulting dictionaries, the Court of Appeals concluded this word means "specified action or pursuit". *Lang*, 2017 WL 1833477 at *6. But Appellant plausibly argued that if the word means nothing more than "doing" or "action"—or, we might add, "specified action or pursuit"—it is unnecessary: every law is aimed at exterior conduct. *See Ex parte Lo*, 424 S.W.3d 10, 26 (Tex. Crim. App. 2013) ("A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the 'thought

police.' It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene.") (footnotes omitted). That is why our statutes, except the organized retail theft statute and the cargo theft[18] statute, define offenses in terms of the prohibited conduct without including the word "activity":[19] it is unnecessary, as every law targets exterior "activity", and if "activity" really means nothing more than a "specified action or pursuit", every instance of prohibited conduct could be loosely described as an "activity". "A person commits an offense", the murder statute might declare, "if he intentionally or knowingly conducts, promotes, or facilitates an activity in which he causes the death of an individual." Or burglary: "A person commits an offense if, without the effective consent of the owner, the person conducts, promotes, or facilitates an activity in which he enters a habitation with intent to commit a felony, theft, or an assault." Or, most tellingly, theft: "A person commits an offense if he conducts, promotes, or facilitates an activity in which he unlawfully appropriates property with intent to deprive the owner of property." Is it not plain that, whatever meaning we might wrench out of "activity" through recourse to whatever dictionary supports our argument, the Legislature cannot have included the word "activity" to mean simply

[18] Tex. Pen. Code § 31.18(b)(1) ("A person commits an offense if the person knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of: stolen cargo….").

[19] Another location in which the word "activity" appears in our Penal Code, but is used in the heading only, describes group behavior. Tex. Pen. Code § 71.02 (entitled "Engaging in Organized Criminal Activity").

a "specified action or pursuit"? Each of the above offenses involves a "specified action" or a "pursuit"[20] (shooting someone, surreptitiously crawling through a window, filching a pocketbook), but they are not actually described in the Penal Code in terms of the word "activity" because that word implies something more than what the offenses already describe. We "presume that every word has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible", *Arteaga v. State*, 521 S.W.3d 329, 334 (Tex. Crim. App. 2017), so we should not presume that "activity" was included unnecessarily. And, consider the definitions carefully that were just given in footnote 21, and reflect on this: when we follow this train of definitions we can either come to the conclusion that "activity", as defined by the Court of Appeals, simply means nothing more than "doing" or "action" ("to do or take part in something"), or that it means regular, organized, ongoing, group action ("a systematic purposeful activity"). *See* https://www.merriam-webster.com/dictionary/systematic (accessed November 15, 2017) (defining "systematic" in meanings 3a and 3b as "methodical in procedure or plan" and

[20] https://www.merriam-webster.com/dictionary/pursuit (accessed November 15, 2017) (defining "pursuit" as the act of pursuing") and https://www.merriam-webster.com/dictionary/pursuing (accessed November 15, 2017) (defining "pursue" in meaning 4a as "to engage in") and https://www.merriam-webster.com/dictionary/engage (accessed November 15, 2017) (defining "engage" under "intransitive verb" in meanings 2a and 2b as "to begin and carry on an enterprise or activity—used with *in*" and "to do or take part in something" (emphasis in original) and https://www.merriam-webster.com/dictionary/enterprise (accessed November 15, 2017) (defining "enterprise" in meaning 3a as "a systematic purposeful activity").

"marked by thoroughness and regularity") and https://www.merriam-webster.com/dictionary/system (accessed November 15, 2017) (defining "system" in meaning 1d as "a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose"). How can one choose between the two definitions without consulting more than the statute itself? Surely the rabbit trail of definitions, and the Court of Appeals' act of stopping short in pursuing that rabbit trail, proves the wisdom of Justice Stevens: "Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent." *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572, 125 S. Ct. 2611, 2628, 162 L. Ed. 2d 502 (2005) (Stevens, J., dissenting) (emphasis in original). Regardless, it is not difficult to show that "activity" is ambiguous, so legislative history ought to be consulted.

This is a fun game, so let's play it with the word "organized", which means "having a formal organization to coordinate and carry out activities".[21] This seems plain enough that the statute is intended to target group activity, but alas, headings

[21] https://www.merriam-webster.com/dictionary/organized (accessed November 15, 2017) (meaning 1).

""do[] not limit or expand the meaning of a statute", Tex. Gov't Code § 311.024. Still, follow "organization" and you will find it meaning "association, society"[22] (meaning 2a, here: https://www.merriam-webster.com/dictionary/organization) or "the act or process of organizing or of being organized". *Id*. (meaning 1a). And "organize" can mean "to arrange by systematic planning and united effort". https://www.merriam-webster.com/dictionary/organizing (meaning 3).[23] Ah, and if we ignore "united effort" (did the Court of Appeals not ignore the meaning of "pursuit" in its analysis? *see* footnote 21 and related body of brief, *supra*), then "to arrange by systematic planning" sounds a lot like the prosecutor's argument to the trial court: "someone [who] goes into a retail establishment and has a plan to steal and does so in a planned manner" engages in "organized" retail theft, (IV R.R. at 44), and in "any case thieving always involves some kind of organized thought." (IV R.R. at 45).

Play the game as long as you like: legislative history must be consulted if the Court is unconvinced by Appellant's arguments for Issue Three or its analysis before the Court of Appeals.

C. Absurd Result

Extra-textual factors may also be considered when consulting the plain

[22] Group activity—but, sad to say: Tex. Gov't Code § 311.024. Still, headings cannot be irrelevant to a statute's meaning.

[23] It can mean lots of other things that seem to support, ineluctably, the conclusion that the statute targets group activity, but, woe is us: Tex. Gov't Code § 311.024.

language of a statute leads to an absurd result.[24] *Schunior*, 506 S.W.3d at 34. There is at least one absurd result that flows from construing the statute to find that a person can violate it by acting alone to commit ordinary shoplifting. This can be seen in the following hypothetical.

A person walks past the point-of-sale with merchandise while harboring the requisite intent. He has thus violated the "simple" theft statute. Having done so, he possesses stolen retail merchandise. Now, at this point he cannot have violated the organized retail theft statute because he has not done any "activity" with respect to the stolen retail merchandise: even if he, at the moment of stealing, possesses stolen merchandise he has not yet conducted an activity in which he possesses it—when he conducted the activity the merchandise was not yet stolen. Now, he saunters out to his vehicle (conducts an activity)[25] while carrying (possessing) the (now stolen) retail merchandise. Thus, merely by continuing to walk out of the store, he has committed organized retail theft. But every shoplifter

[24] Actually, the cases specify that these absurd results must be ones that the "the Legislature could not *possibly* have intended". *Boykin*, 818 S.W.2d at 785 (emphasis in original). This addition seems to be the result of *Boykin*'s care to state emphatically the basic framework for statutory construction—after all, which absurd results do we think the Legislature *does* intend? And would this Court really uphold a construction of a statute that led to an absurd result merely on the ground that the Legislature, whom we presume "did not act arbitrarily or unreasonably", *State v. Rosseau*, 396 S.W.3d 550, 557 (Tex. Crim. App. 2013), might have intended absurd results?

[25] Appellant does not think that "activity" simply means "doing something" or "an act", *see* Appellant's Brief, Pages 39-42 and *Lang*, 2017 WL 1833477 at *6, nor that "conducts" in the context of the statute means simply "to do", *see* Appellant's Brief, Page 43-44 and *Lang*, 2017 WL 1833477 at *4, but let us assume they do for the sake of argument.

will do this, and thus every shoplifter commits both theft and organized retail theft. Moreover, the shoplifter who takes the stolen merchandise home, sits on his couch, and gazes at the fruits of his theft—by the very act of sitting and staring at the pilfered goods—commits a new organized retail theft: he conducts an activity (sits on the couch and looks at the stolen merchandise) in which he possesses stolen merchandise (he is holding it after all). The basic point is that, under the reasoning of the Court of Appeals, these scenarios are not only possible but inevitable—and they are untenable.

Now, the Court of Appeals did not think this absurd because the Legislature is free to, and has, criminalized the same conduct under different statutes. *See Lang*, 2017 WL 1833477 at *6. But, the problem with the analysis of the Court of Appeals is that the above-described actions are not the same conduct, that is, the same act, but neither are they separate and distinct acts have nothing to do with each other—they are at best separate parts of a continuum of different-yet-related actions, but by criminalizing each stage of the trip from the register to the car to the couch, we seem to be straying into the realm of stop-action prosecution. *Patterson v. State*, 152 S.W.3d 88, 92 (Tex. Crim. App. 2004). And, while the legislature can criminalize separate acts within the same course of conduct (for example, touching a child's anus and breast during the same sequence of molestation), it does so when there is clear statutory authority for doing so based on the gravamen of the offense,

and the offenses are not otherwise subsumed under *Patterson*. Under the reasoning of the Court of Appeals, however, one act of shoplifting can result in innumerable violations of the organized retail theft statute: after our hypothetical thief moves the merchandise to the "man cave", he violates the statute again; to the kitchen, again; to the living room…—and this is plainly absurd.

D. Legislative History

Since the statute is ambiguous, and since at least one absurd result flows from the interpretation of the Court of Appeals, we can—indeed, we must—consult the legislative history. It could hardly be clearer from that legislative history, as well as the legislative history of the related cargo theft statute, that the Legislature intended to target mobile, professional theft rings, not ordinary, solitary shoplifters.

1. 2007 Legislative History

The Legislature enacted the organized retail theft statute in 2007 to combat professional theft rings. (Appendix, Tab 1). As the House Committee Report Bill Analysis describes it, "[o]rganized retail crime is *distinct from petty shoplifting* in that it involves *professional theft rings* that move quickly from community to community and across county lines to steal large amounts of merchandise." *See* House Committee Report Bill Analysis for H.B. 3584, 80th R. Leg. Session (Appendix, Tab 1.1) (Page 1) (emphasis added). The analysis continues: "[t]his criminal activity requires many thieves (boosters) organized by a central figure

(fence) that pays the boosters pennies on the dollar, then repackages and resells the merchandise through alternate distribution channels to the general public." *Id*. (Appendix, Tab 1.1) (Page 1). Likewise, the House Research Organization's Bill Analysis summarizes the supporters of the bill as noting that the bill "would combat the growth of organized retail theft, in which groups of shoplifters and fences form multi-state crime rings that cost retailers millions of dollars a year in stolen goods. *The bill would weaken these organized rings by targeting the fences who hold the syndicates together*. If the public could effectively prosecute and incarcerate *these key players*, then shoplifters would have difficulty selling stolen merchandise and would be discouraged from shoplifting in the future." *See* House Research Organization Bill Analysis for H.B. 3584, 80th R. Leg. Session (Appendix 1, Tab 1.2) (Page 2) (emphasis added). The same analysis notes supporters arguing "[c]urrent theft laws are inadequate because they penalize individual transfers of stolen merchandise." *Id*. (Appendix, Tab 1.2) (Page 2). The bill's opponents noted that the underlying activity is already criminal "under the existing theft, conspiracy, and accomplice statutes." *Id*. (Appendix, Tab 1.2) (Page 3).

Several conclusions emerge from the legislative history thus far. First, the purpose of 31.16 is to target professional theft rings, which steal retail merchandise and resell it. (Appendix, Tab 1). These theft rings are highly organized, both

hierarchically (containing "boosters" and "fences") and in executing a common plan across a wide area (such rings are "multi-state" in scope and "move quickly from community to community and across county lines to steal large amounts of merchandise"). (Appendix, Tab 1.1) (Page 1). It is this highly organized, systematic, professional retail theft that the legislature targeted with Section 31.16—indeed, the legislative history distinguishes between organized retail theft and "petty shoplifting". (Appendix, Tab 1.1) (Page 1).

Second, the criminal activity the Legislature was targeting is therefore *not* the individual shoplifting, but rather, the broader and higher organized criminal activity occurring after the theft and which is directed by the "fences": "[t]he bill would weaken these organized rings *by targeting the fences* who hold the syndicates together." (Appendix 1, Tab 1.1 (Page 1); Tab 1.2 (Page 2)) (emphasis added). The Legislature was not unconcerned about shoplifting, of course, but decided to strike at the heads of the broader and higher criminal behavior: because the Legislature was advised that "[i]f the public could effectively prosecute and incarcerate these *key players*, *then shoplifters* would have difficulty selling stolen merchandise and would be discouraged from shoplifting in the future." (Appendix 1, Tab 1.2) (Page 2) (emphasis added). The second conclusion parallels the first: just as the Legislature was targeting professional theft rings, and specifically, the

key players in those rings, so the Legislature was not targeting ordinary shoplifting.

Third, then-current theft statutes were inadequate because they punished "individual transfers of stolen merchandise" only. (Appendix, Tab 1.2) (Pages 2-3). The first point to note is that speaking of "stolen" merchandise shows the concern was with disposing of already stolen property, not with taking property—otherwise, the Legislative history would state that then-current theft statutes were inadequate because they punished "individual instances of stealing merchandise" only. It is not the theft, but what comes afterwards, that the Legislature was addressing. The second point is that inadequacy based on "individual" transfers evinces the intent to criminalize ongoing conduct rather than a single instance of shoplifting. The third point is that by highlighting "transfers" the Legislature plainly had the exchange of stolen property from one person to another, not the individual thefts—otherwise, current laws would be inadequate because they punished "individual thefts of merchandise" only. Because the theft statutes were inadequate, a new statute was needed to cover broader criminal behavior, not to increase the punishment for individual, isolated instances of shoplifting.[26]

[26] The Legislature has not been unconcerned with increasing the punishment for activity falling within the purview of the organized retail theft statute. *See* (Appendix, Tab 2.2) (House Committee Report Bill Analysis for H.B. 2482, 82nd R. Leg. Session) (Page 1) ("interested parties believe that Texas must impose stronger punishment and penalties on these large-scale organized retail thefts [for various reasons]"); (Appendix, Tab 2.3) (House Research Organization Bill Analysis for H.B. 2482, 82nd R. Leg. Session) (Page 3) (supporters note that

(Appendix, Tab 1.2) (Pages 2-3). Interestingly, and relatedly, the opponents of the bill argued that existing penal statutes were sufficient to cover the targeted criminal activity, but only by using a combination of "the existing theft, conspiracy, and accomplice statutes." (Appendix, Tab 1.2) (Page 3). In other words, had 31.16 been intended to cover simple shoplifting, the opponents would likely have argued that 31.03—not 31.03 plus other statutes—was sufficient to cover the criminal activity falling within the purview of the proposed statute. (Appendix, Tab 1.2) (Page 3).

Fourth, the following language shows why the organized retail theft statute speaks in terms of *stolen* retail merchandise, not *stealing* retail merchandise: the "central figure (fence)…pays the boosters pennies on the dollar, then repackages and resells the merchandise through alternate distribution channels to the general public." (Appendix, Tab 1.1) (Page 1); Tex. Pen. Code § 31.16(b)(1)-(2). The statute was aimed at the "fence", the one who would receive (or possess or store, etc.) the retail merchandise and then resell it. But to do so, the merchandise must already have been stolen. Hence, the legislature required the retail merchandise to be stolen already, or expressly represented as stolen, and thus did not criminalize

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"[p]rosecutors currently do not use the organized retail theft statute frequently because the penalties are the same as for general theft"). But the "stronger punishment" is aimed at the "large-scale organized retail thefts", not petty shoplifting. *See* (Appendix, Tab 2.2) (Page 1). And even that concern may now be lessened, as the Legislature has recently lowered the so-called "value ladder" and corresponding punishment range for violations of Section 31.16. *Cf.* the various versions of 31.16 found in the Appendix at Tab 3.

the act of stealing itself. Tex. Pen. Code § 31.16(b)(1)-(2). And indeed, this makes sense because Texas Penal Code 31.03(a) already covers the act of stealing. Tex. Pen. Code § 31.03(a) ("A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property."); Tex. Pen. Code § 31.02 ("Theft as defined in Section 31.03 constitutes a single offense superseding…shoplifting").

The upshot is this: Section 31.16 targets organized criminal activity, and specifically, the "fences" in that activity, while "boosters" (ground-level thieves) are subject to the Section 31.03.

2. 2011 Legislative History

In 2011 the Legislature amended the statute, and the legislative history confirms the above interpretation of Section 31.16.

The Senate Research Center's Bill Analysis for H.B. 2482 describes "[o]rganized retail crime (ORC) [as] the orchestrated scheme to convert stolen goods to cash. It can generally be described as professional burglars, boosters, cons, thieves, fences and resellers conspiring to steal and sell retail merchandise obtained from retail establishments by theft or deception." *See* Senate Research Center Bill Analysis for H.B. 2482, 82nd R. Leg. Session (Appendix, Tab 2.1) (Page 1). Continuing, the bill analysis describes the scheme of organized criminal activity: a booster is the "front line thief who steals with the intention of reselling

the stolen goods"; such boosters not uncommonly work in a "booster group" moving from "city to city or across state lines [and taking] several thousand dollars of goods a day"; these boosters "coordinate with 'fences,' the first buyers of the stolen goods, who typically purchase the items for pennies on the dollar"; these fences then "sell the items outright at flea markets, convenience stores, or online"; and sometimes these fences "repackage [the stolen goods] for sale to higher level fences." *Id*. (Appendix, Tab 2.1) (Page 1). Thus, "H.B. 2482 targets the patterns of these crimes committed by corrupt *enterprises* by allowing the *major players and ring leaders* to be held accountable." *Id*. (Appendix, Tab 2.1) (Page 1) (emphasis added).

Likewise, the House Committee Report's Bill Analysis comments that "[i]interested parties contend that organized criminal enterprises, including gangs and foreign nationals, are often behind organized retail theft crimes and that these crimes have been linked to the funding of domestic and international terrorism, drugs, guns, prostitution, and human smuggling." *See* House Committee Report Bill Analysis for H.B. 2482, 82nd R. Leg. Session (Appendix, Tab 2.2) (Page 1). This is a far cry from ordinary shoplifting.

Now, in 2011 the Legislature did show some concern for the actual theft from the retail establishment. In describing how retail theft might occur using fire exits and fire alarms, the Senate Research Center's Bill Analysis states: "The large

dollar losses typically occur through the fire exits, as criminals stage hundreds and sometimes thousands of dollars worth of high dollar merchandise, typically at the back of the store and have their *accomplice* drive around the building, either communicating with walkie-talkies or cell phones, and then break out the exit to the waiting vehicle, which takes 10 to 20 seconds to load the merchandise and escape undetected." (Appendix, Tab 2.1) (Page 1) (emphasis added). Thus, with regard to the actual theft, the Legislature had in mind persons working together—"criminals" and their "accomplice"—to steal retail merchandise. The bill analysis also observed that "[c]urrent law does not address the disabling of fire exit alarms. It only addresses setting off an alarm as a distraction, which is rarely the case." *Id.* Thus, the legislature added 31.16(d)(2), which increases the level of the offense if a person "engaged in an activity described by Subsection (b)" activates a fire alarm, deactivates or disables a fire exit alarm or retail theft detector, or uses a shielding or deactivation device to prevent or attempt to prevent the detection of the offense by a retail theft detector. *See* 2011 Version of 31.16 (Appendix, Tab 3.2) (Page 2). Such aggravating circumstances, however, can only be committed by the person who receives, possesses, conceals, etc. the already stolen merchandise. Tex. Pen. Code § 31.16(b)(1). And it is clear from the legislative history quoted above that these aggravating circumstances are committed, for purposes of the organized retail theft statute, in conjunction with someone else.

See (Appendix, Tab 2.1) (Page 1) ("These criminal groups are also particularly nimble—able to easily change their appearance, alter their method of operation, and particularly adept at circumventing security devices and procedures."). Thus, even the addition of this Subsection (d)(2) does not evince an attempt to punish ordinary shoplifting committed by a single person: rather, the subsection is aimed at conduct typically used by those involved in the criminal enterprise of organized retail theft.

In sum, the legislative history confirms that the legislature enacted Section 31.16 to combat highly organized criminal activity, not ordinary shoplifting.

3. Comparison with the cargo theft statute

This conclusion is bolstered by considering the cargo theft statute and its legislative history. The statute uses language nearly identical to Section 31.16 to define the offense. Tex. Pen. Code § 31.18; (Appendix, Tab 4). Subsection (b)(1) of that statute is almost identical to the relevant part of the organized retail theft statute:

"(b) A person commits an offense if the person:

(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo".

Tex. Pen. Code § 31.18(b)(1); (Appendix, Tab 4.5).

The legislative history, like that for the organized retail theft statute, confirms that the Legislature was targeting crime rings: "[c]argo theft by organized crime rings has become a very serious problem in this state," and "most cargo theft is undertaken by sophisticated, organized crime rings." *See* Senate Research Bill Analysis for S.B. 1828, 84th R. Leg. Session (Appendix, Tab 4.4, Page 1). These "organized crime syndicates…employ expendable 'pawns'." *Id*. Still, cargo theft could be committed individually, as the legislative history makes clear, and was difficult to prosecute under existing law. *Id*. (discussing the difficulty under current law of discerning when the owner's effective consent was vitiated, and noting that "most" cargo theft is committed by "sophisticated, organized crime rings"). As a result, the Legislature added a section not found in the organized retail theft statute that addresses the underlying cargo theft committed by an individual: a person commits an offense if the person

"(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1), knowingly or intentionally:

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo."

Tex. Pen. Code § 31.18(b)(2); (Appendix, Tab 4.5).

We can draw several conclusions from the cargo theft statute and its legislative history when compared with the organized retail theft statute. As both had the same purpose of addressing highly organized professional theft rings, both were drafted similarly. *Cf.* Appendix, Tab 3 *with* Appendix, Tab 4.5. But, where the Legislature wished to penalize the underlying theft committed individually, the Legislature made that intent clear by adding a subsection specifically addressing that type of theft. *See* Tex. Pen. Code § 31.18(b)(2). Still, the underlying cargo theft cannot be committed in isolation—the individual must act with "intent to conduct, promote, or facilitate an activity described by Subsection (b)(1)"—so even the underlying cargo theft must be connected with organized criminal activity. Tex. Pen. Code § 31.18(b)(2). The person who commits the underlying theft can be prosecuted for cargo theft only if he does so intending to promote the organized group activity that ordinarily constitutes cargo theft. Tex. Pen. Code § 31.18(b)(2). And, because this special provision is found in the cargo theft statute but not the organized retail theft statute, we can infer that the Legislature did not

intend to punish individual shoplifting under the organized retail theft statute, even when ultimately (that is, "post-theft", as through reselling) connected with organized criminal activity. *Cf.* Appendix, Tab 3 *with* Appendix, Tab 4.5. Indeed, that is what the legislative history for the organized retail theft statute, as detailed above, makes clear.

E. Conclusion

If the Court is not persuaded by Appellant's argument for Issue Three, then it is easy to show that legislative history must be consulted, and that history supports but one conclusion: Appellant's conduct is not covered by the statute.

SUMMARY OF THE ARGUMENT FOR ISSUE ONE

ISSUE ONE: May this Court adhere to a rule that refuses to allow the consideration of legislative history to interpret a statute unless the statute is ambiguous, when the Legislature states that legislative history may be considered whether or not a statute is ambiguous?

a. Must *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991) and its progeny be overruled to the extent they conflict with Texas Government Code Section 311.023, which Texas Penal Code Section 1.05(b) makes applicable to the Penal Code?

Section 311.023 must be followed, unless it is unconstitutional. Section

311.023 is not unconstitutional because it does not violate the separation of powers provision of the Texas Constitution: it neither interferes, unduly or at all, with a core judicial power, nor does it turn judges into lawmakers. In fact, if Section 311.023 is unconstitutional, so would other parts of the Code Construction Act because they by their very nature instruct the judiciary ("interfere with") on how to interpret statutes. Because Section 311.023 is constitutional, we must determine whether to depart from *Boykin* as it pertains to when extra-textual factors may be considered.

This aspect of *Boykin* contains numerous problems: it is self-contradictory, contrary to the twice-expressed intent of the Legislature, violates other canons of construction as applied here, contravenes rather than effects the will of the Legislature, and fails to consider the recognized utility of legislative history. In short, *Boykin* was poorly reasoned in this respect. Because precedent may be overruled when it is poorly reasoned, *stare decisis* does not bar this Court from departing from *Boykin*. Alternatively, the Court could leave *Boykin* intact with respect to all statutes that predate the 60th legislative session, based on the Code Construction Act's stated applicability.

ARGUMENT FOR ISSUE ONE

A hypothetical sets the tone for this issue. From time to time the Legislature enacts a statute in response to a decision of this Court. *See, e.g.*, Senate Research

Center Bill Analysis for S.B. 487, 84th R. Leg. Session ("Unfortunately, recent Texas Court of Criminal Appeals decisions have strictly interpreted the language of Chapter 64 to require proof that biological evidence exists before a judge can allow testing to see if exculpatory biological evidence exists."); *Ex Parte Robbins*, 478 S.W.3d 678, 704 (Tex. Crim. App. 2014) (Cochran, J., concurring) ("The Texas Court of Criminal Appeals voted against granting a new trial, with the majority finding no path to habeas relief under current law.") (quoting House Research Organization, Bill Analysis, Tex. S.B. 344, 83rd Leg. R.S. (2013)). Now, suppose the Legislature did not like *Boykin*'s conclusion that legislative history may be considered if, and only if, the statute is ambiguous or leads to absurd results that the Legislature could not possibly have intended. What might the Legislature do?

It might enact a statute that reads, "Whether or not a statute is ambiguous on its face, a Court may consider legislative history." But that is exactly what it had already done when *Boykin* was decided. Tex. Gov't Code § 311.023(3). What can the Legislature do to overrule *Boykin* but what it had done already?

Boykin is not a decision that *must* be what it is: there is no immutable law decreeing that legislative history cannot be considered unless a statute is ambiguous or leads to absurd results. So, the Legislature may enact a statute—and indeed has enacted a statute—that allows for consideration of legislative history

whether not a statute is ambiguous. Unless this Court declares 311.023 unconstitutional—and to do that the Court would necessarily call into question other parts of the Code Construction Act—311.023 must be followed, in spite of *Boykin*. But 311.023 is not unconstitutional.

A. Separation of Powers

Boykin suggested, in a footnote, that Section 311.023 violates the separation of powers provision of the Texas Constitution[27] in two ways: first, in that it constituted legislative interference with a core judicial function, and second, in that it would involve the judiciary assuming legislative authority. *Boykin v. State*, 818 S.W.2d 782, 786, n. 4 (Tex. Crim. App. 1991). Although *Boykin* did not elaborate about what this latter violation entails, presumably it occurs because, by ignoring the plain language of the statute, courts become lawmakers. *See*, *Smith v. State*, 18 Tex. App. 454, 455, (Tex. App. 1885, no pet.) ("If we were at liberty to look beyond the plain, unambiguous *words* of the statute, we would be disposed to place a very different construction upon its *intent* than the one we must give to its language. But were we to do this, we would be open to the censure of judicial legislation.") (emphasis in original) (cited in *Sparks v. State*, 76 Tex. Crim. 263,

[27] Tex. Const. art. II, § 1

174 S.W. 351, 352 (Tex. Crim. App. 1915),[28] which in turn is cited in note 4 of *Boykin*). In turn, then:

1. Interference with Core Judicial Powers

"[T]he separation of powers provision may be violated in either of two ways. First, it is violated when one branch of government assumes, or is delegated, *to whatever degree*, a power that is more 'properly attached' to another branch…The provision is also violated when one branch *unduly* interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers." *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990) (citation omitted and emphasis in the original). This case does not involve the assumption or delegation of a power—the Legislature has not arrogated to itself the right to interpret statutes through judicial decisions, nor has it delegated a legislative power to the courts; rather, this case implicates, if anything, the "undue interference" test. Under that test, we determine if the Legislature, through Section 311.023, has unduly interfered with "the courts' exercise of the 'judicial' power." *Id*. "The core of this judicial power embraces the power (1) to hear evidence; (2) to decide the issues of fact raised by the pleadings; (3) to decide the relevant questions of law; (4) to enter a final judgment on the facts and the law; and (5) to

[28] *Sparks*, citing many cases, observed that it "seem[ed] to be the universal rule" that "[w]here the meaning of the words used is plain, the act must be carried into effect according to its language, or the courts would be assuming legislative authority." *Sparks*, 174 S.W. at 352-353. What happens, though, when the plain language of the statute allows the court to go beyond the plain language of the statute?

execute the final judgment or sentence." *Id*. (emphasis removed). Here, only the third power—to decide the relevant questions of law—is implicated, insofar as we are considering a question of statutory construction, which is a question of law. *Yazdchi v. State*, 428 S.W.3d 831, 837 (Tex. Crim. App. 2014). In this inquiry, "it is no simple task to determine whether any given legislative action that affects the exercise of judicial power is a violation of the separation of powers provision." *Armadillo Bail Bonds*, 802 S.W.2d at 240. Or perhaps it is not so difficult anymore, since in the opinion denying the State's motion for rehearing in *Ex parte Lo*, this Court stated that it was the mere "fact of the attempted interference at all" with the courts' ability to enter a final judgment when it likes that violated the separation of powers doctrine: "Entering a final judgment is a core judicial power; it falls within that realm of judicial proceedings 'so vital as to the efficient functioning of a court as to be beyond legislative power.'" *Ex parte Lo*, 424 S.W.3d 10, 29 (Tex. Crim. App. 2013) (op. on reh'g) (quoting *Armadillo Bail Bonds*, 802 S.W.2d at 240). Has *Ex parte Lo* overruled *Armadillo Bail Bonds*'s modifier ("unduly") *sub silentio*?

An interesting question, but one not necessary to the resolution of this case because Section 311.023 does not "interfere" with this Court's ability to decide questions of law at all. To "interfere", as relevant to this case, means "to interpose

in a way that hinders or impedes: come into collision or be in opposition".[29] "Interpose" means "to be or come between".[30] To "hinder" means "to delay, impede, or prevent action",[31] while to "impede" means "to interfere with or slow the progress of".[32] Section 311.023 does not prevent a court from considering anything, restrict a court from considering anything, or even require a court to consider anything. Tex. Gov't Code § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court *may* consider among other matters the….) (emphasis added); Tex. Gov't Code § 311.016(1) ("'May' creates discretionary authority or grants permission or a power"). As such, it cannot be said to "hinder or impede" a court at all—perhaps that is why the Section 311.023 is entitled "Statute Construction *Aids*". Tex. Gov't Code § 311.023 (emphasis added). *Boykin* recognized as much, *Boykin*, 818 S.W.2d at 786, n. 4 ("Section 311.023 of the Texas Government Code invites, but does not require, courts to consider extratextual factors when the statutes in question are *not* ambiguous") (emphasis in original), which is perhaps why *Boykin* stopped short of declaring 311.023 unconstitutional. *Id.* Instead, *Boykin* suggested Section 311.023 is unwise, but an unwise law is not an unconstitutional one. *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968) ("In passing upon the constitutionality of a statute,

[29] https://www.merriam-webster.com/dictionary/interfere (accessed November 14, 2017).
[30] https://www.merriam-webster.com/dictionary/interpose (accessed November, 14, 2017).
[31] https://www.merriam-webster.com/dictionary/hinder (accessed November 14, 2017).
[32] https://www.merriam-webster.com/dictionary/impede (accessed November 14, 2017).

we begin with a presumption of validity. It is to be presumed that the Legislature has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable. The wisdom or expediency of the law is the Legislature's prerogative, not ours.") (quoted in *State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 909, n. 14 (Tex. Crim. App. 2011); *Salinas v. State*, 523 S.W.3d 103, 121 (Tex. Crim. App. 2017) (Newell, J., dissenting) ("The late Supreme Court Justice Antonin Scalia famously quipped that 'a lot of stuff that's stupid is not unconstitutional.'"). Because Section 311.023 does not interfere with a core judicial power at all, it does not violate *Ex parte Lo*, if that is the new test, nor can it unduly interfere if it does not interfere in the first place, if *Armadillo Bail Bonds* is still the test. *Ex parte Lo*, 424 S.W.3d at 29; *Armadillo Bail Bonds*, 802 S.W.2d at 239. If it did, observe that this would call other parts of the Code Construction Act into question for also "interfering", unduly or otherwise, with the judiciary's power to decide questions of law, since they also tell the courts how to interpret statutes.

2. Judicial Lawmaking?

Boykin also suggested that Section 311.023 violates the doctrine of separation of powers because consulting extratextual factors absent ambiguity or absurdity would involve the judiciary invading the province of the Legislature: it

would turn judges into lawmakers. *Boykin*, 818 S.W.2d at 786, n. 4 (*citing Sparks*, 174 S.W. at 352). The rub is that by disregarding Section 311.023, *Boykin* has turned this Court into the Legislature: although Section 311.023 is clear and unambiguous, this Court has disregarded it, and set up instead its own law, with the attendant consequences discussed in Appellant's petition for discretionary review, and reiterated below.

The real concern here seems to be that going beyond the text will undermine the text, but this fear is unjustified. An excursion beyond the text will be at the service of the text; if it is not, what is found will be disregarded. Or does the Court believe that its members are incapable of disregarding extra-textual factors plainly out of step with the language of the statute? How, then, do we trust jurors more to disregard improper argument after seemingly perfunctory instructions from the trial judge? *Hawkins v. State*, 135 S.W.3d 72, 84 (Tex. Crim. App. 2004) ("When counsel asks for a particular instruction and the trial court accedes to the request by saying 'the jury is so instructed,' that instruction will in most cases be considered effective to cure the harm from an improper argument."). And, do appellate courts not disregard, routinely and without problem, matters not properly before them, such as documents attached to briefs that are not found in the record, *Robles v. State*, 85 S.W.3d 211, 215 (Tex. Crim. App. 2002) (Keasler, J., dissenting) ("But neither of these previous judgments is in the record; rather, they are merely

attached as appendices to Robles's brief. An appellate court cannot consider documents attached to briefs that do not appear in the appellate record."), *State v. Smith*, 335 S.W.3d 706, 711 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) ("Because the appended materials attached to Smith's appellate brief are not part of the appellate record and were not presented to the trial court at the time of the trial court's ruling, we do not consider these documents in our review."), or—as in this case, below—legislative history plainly contrary to the reviewing court's interpretation of the statute? Why do we think reviewing courts are unable to set aside legislative history if it proves unhelpful? Section 311.023 merely embodies a common sense rule: additional evidence may be considered, if it helps, and if it does not, it is disregarded. This hardly turns judges into lawmakers.

Section 311.023 is not unconstitutional, so *Boykin* needs to be reevaluated and either overruled in part or distinguished.

B. Texas Government Code Section 311.023 and *Boykin*

The will of the legislature, as expressed in the plain language of Section 311.023, is as follows: "[i]n construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:…(3) legislative history". Tex. Gov't Code § 311.023(3). In *Boykin*, this Court announced instead that "[i]f the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then *and only*

then, out of absolute necessity is it constitutionally permissible for a court to consider, in arriving at a sensible interpretation, such *extra*textual factors as executive or administrative interpretations of the statute or legislative history." *Boykin*, 818 S.W.2d. at 785-786 (emphasis in original). So, there is a conflict.

The First Court of Appeals claims *Boykin* has been "eviscerated" by *Lanford v. State*, 847 S.W.2d 581, 587 (Tex. Crim. App. 1993): "As in *Warner*, we again easily avoid a conflict [between Section 311.023 and *Boykin*] by resorting to *Lanford v. Fourteenth Court of Appeals*, in which the court of criminal appeals eviscerated its *Boykin* rule by finding ambiguity when the parties took polar opposite interpretations of the text…Because the parties take polar opposite positions here, we are free to apply the Code Construction Act in resolving the issue." *Allen v. State*, 11 S.W.3d 474, 476 (Tex. App.—Houston [1st Dist.] 2000), *aff'd*, 48 S.W.3d 775 (Tex. Crim. App. 2001). But this does not resolve the conflict; it only deepens it. For it acknowledges[33] that an ambiguity must be found before the will of the Legislature—that legislative history be available for consideration in all cases—may be followed.

And yet the *Boykin* rule persists. But should it?

C. Reasons to Depart from, or Modify, *Boykin*

1. *Boykin* is self-contradictory

[33] Of course, as an intermediate appellate court, the First Court could not do any more.

Boykin purported to adopt a rule that "demonstrates respect for [the legislative] branch" by offering "the only method that does not unnecessarily invade the lawmaking province of the Legislature." *Boykin*, 818 S.W.2d at 785-786. The "Legislature", said *Boykin*, "is *constitutionally entitled* to expect that the Judiciary will faithfully follow the specific text that was adopted." *Id*. at 785 (emphasis in original). Thus, *Boykin* counseled adherence to the "literal text of the statute" and "the plain language" of the statute. *Id*.

How, then, can it ignore the plain language of Section 311.023? What could be plainer than "*whether or not a statute is considered ambiguous on its face*", extra-textual sources may be considered? Tex. Gov't Code § 311.023(3) (emphasis added). How does it demonstrate respect for the Legislature to ignore what the Legislature has said? Why can the Legislature not write statutes and then give guidance as to how they should be interpreted? Why is the Legislature not "constitutionally entitled" to expect that the Judiciary will faithfully follow the text of Section 311.023 that was adopted? *See Boykin*, 818 S.W.2d at 785. *Boykin* suggested that resorting to extra-textual sources is unwise—but the Legislature is free to enact unwise laws. *Fine*, 330 S.W.3d at 909, n. 14; *Salinas*, 523 S.W.3d at 121 (Newell, J., dissenting).

2. The Legislature has twice told courts to consider legislative history in construing the Penal Code

Texas Penal Code Section 1.05, entitled "Construction of Code" states in

subsection (b) that "Unless a different construction is required by the context, Sections…311.021 through 311.032 of Chapter 311, Government Code (Code Construction Act), apply to the construction of this code." Tex. Pen. Code § 1.05(b). So, once in the Penal Code, and once through the Government Code, the will of the Legislature—wise or unwise—is plain that legislative history may be considered no matter what. This Court is not free to contravene that will absent a finding that Section 311.023 is unconstitutional in some respect, and *Boykin* did not hold Section 311.023 to be unconstitutional. Indeed, this Court has elsewhere considered legislative history and justified doing so with reference to Section 311.023 and respect for the will of the legislature: "Clearly both the House and Senate believed that all defects in a charging instrument were waived if not raised by a defendant before trial. Clearly the perceived evil they were correcting was the raising of indictment defects for the first time after a trial and conviction and the subsequent reversal of that conviction because of that defect. To say that an indictment that does not contain an element of an offense is not an 'indictment for purposes of SB 169, would be to completely ignore the entirety of Govt. Code Sec. 311.023, as well as to thwart the intent and the will of the legislature and, presumably, the people who passed Art. V, § 12." *Studer v. State*, 799 S.W.2d 263, 270–71 (Tex. Crim. App. 1990).

3. *Boykin* as applied here violates other canons of construction

It is well-settled that "[n]either the trial court nor this court has the power to legislate and read into a statute something which the legislature has omitted therefrom." *Barkley v. State*, 152 Tex. Crim. 376, 384, 214 S.W.2d 287, 291–92 (1948). Section 1.05 states: "Unless a different construction is required by the context", Section 311.023 applies to the construction of the Penal Code. Yet, *Boykin* makes 1.05 read, "Unless a different construction is required by the context or the statute is unambiguous and would not lead to absurd results…." *Boykin* thus results in words being added to the statute, at least by implication. Yet even *Boykin* recognized that "[w]here the statute is clear and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin*, 818 S.W.2d at 785 (quotation omitted). Since 1.05 is "clear and unambiguous", why does *Boykin* add words that are not there? And, because 1.05 contains but one exception ("Unless a different construction is required by the context") to the application of 311.023 to the Penal Code, no other exception may be implied or grafted on, *State v. Daugherty*, 931 S.W.2d 268, 270 (Tex. Crim. App. 1996)—so why does *Boykin* do so?

4. *Boykin* contravenes rather than effects the will of the Legislature

No one who considers the legislative history detailed above under Issue Two can come away with any other conclusion than that the legislature enacted the

organized retail theft statute to target professional theft rings. By excluding such evidence from review of the statute, *Boykin* can lead to the absurd result that the will of the legislature is not given effect. *See Studer*, 799 S.W.2d at 270–71. And, as the dissent in *Boykin* suggested, sometimes consulting the legislative history before an ambiguity is found is precisely what leads to the will of the Legislature being given effect. *Boykin*, 818 S.W.2d at 789-790 (Miller, J., dissenting); *see Studer*, 799 S.W.2d at 268-271; *Dillehey v. State*, 815 S.W.2d 623, 626 (Tex. Crim. App. 1991); *Ex parte Lo*, 424 S.W.3d at 30 (consulting legislative history in footnote 3 of its opinion on rehearing, despite not declaring the statute ambiguous or the plain language as leading to absurd results).

5. Utility of Legislative History

Boykin based itself in part on its method as being "long recognized and accepted…as constitutionally and logically compelled." *Boykin*, 818 S.W.2d at 786; *see also Sparks*, 174 S.W. at 352-353. But it is not so compelled, as demonstrated above, and legislative history is useful. *County of Washington v. Gunther*, 452 U.S. 161, 182, 101 S.Ct. 2242, 2254, 68 L.Ed.2d 751 (1981) (Rehnquist, J., dissenting) ("[I]t [is] well settled that the legislative history of a statute is a useful guide to the intent of Congress"); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 572, 125 S. Ct. 2611, 2628, 162 L. Ed. 2d 502 (2005) (Stevens, J., dissenting) ("Because ambiguity is apparently in the eye of

the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted. Indeed, I believe that we as judges are more, rather than less, constrained when we make ourselves accountable to *all* reliable evidence of legislative intent."); *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 611, n. 4, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991) ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than from ignoring it"); *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 543–544, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940) ("When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'" (footnote omitted)); *United States v. Fisher,* 2 Cranch 358, 386, 2 L.Ed. 304 (1805) (Marshall, C.J.) ("Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived"). At the very least the wisdom of ignoring clear evidence of legislative intent is up for debate. After all, does it make any sense to read a book while ignoring the author's express guidance for how to interpret that book?

6. Solutions

Rather than overrule *Boykin*'s pronouncement regarding legislative history,

this Court could distinguish the case by holding that its prohibition against considering legislative history does not apply to the Penal Code, because the Code makes 311.023 expressly applicable to the whole Code. This would leave all statutes before the 60th legislative session still generally subject to *Boykin*, since the Code Construction Act applies only to, among other things, statutes enacted by the 60th or later legislative session. *See* Tex. Gov't Code § 311.002. Hence, *Boykin* survives where it can, and the Legislature's will is obeyed as it should be.

Still, the real solution is to follow the will of legislature and apply Section 311.023 as written. We apply the rest of the Code Construction Act without qualm, so why not this part? Under the doctrine of *stare decisis*, we depart from precedent only for urgent, compelling reasons, *McGlothlin v. State*, 896 S.W.2d 183, 189, n. 7 (Tex. Crim. App. 1995) ("In all cases where the issue under consideration has been previously addressed in an opinion, that opinion should be followed unless there are urgent and compelling reasons to overrule that precedent."), *overruled on other grounds by Jacobson v. State*, 398 S.W.3d 195 (Tex. Crim. App. 2013), which includes when a precedent is poorly reasoned. *Paulson v. State*, 28 S.W.3d 570, 571-572 (Tex. Crim. App. 2000) ("But if we conclude that one of our previous decisions was poorly reasoned or is unworkable, we do not achieve these goals [of *stare decisis*] by continuing to follow it. Our decision in *Geesa* requiring trial courts to instruct juries on the definition of

reasonable doubt was poorly reasoned.") (footnote omitted); *Proctor v. State*, 967 S.W.2d 840, 845 & n. 4 (Tex. Crim. App. 1998) (emphasizing that "What we are holding today is that the prior rule was badly reasoned."). The above analysis shows *Boykin* was poorly reasoned (for example, *Boykin* is all too happy to follow the plain language of the statute until met with a statute—Section 311.023—where the will of the Legislature is plain, and plainly contrary to *Boykin*), so why not eschew its general prohibition against considering legislative history? Note that this Court does not need to hold that legislative history *must* be considered in every case, only that it *can* be considered. Tex. Gov't Code § 311.023 (permitting, but not requiring, courts to consider extra-textual factors even if a statute is unambiguous). The rule Appellant asks for, then, is simple and conforms to the will of the Legislature as plainly expressed in Section 311.023: in all cases of statutory interpretation, legislative history may be consulted. And, when the legislative history of the organized retail theft statute is considered, it supports but one conclusion: Appellant's conduct falls outside the statute, and she is entitled to an acquittal.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant asks this Court to REVERSE and RENDER a judgment of acquittal, and in the alternative, to

REVERSE and REMAND the case to the Third Court of Appeals for reconsideration of Appellant's legal sufficiency challenge.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that according to Microsoft Word's word count tool, the relevant portions of this document contain 14,999 words.

/s/ Justin Bradford Smith
Justin Bradford Smith

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, a true and correct copy of Appellant's Brief is being forwarded to the counsel below by email and/or eservice:

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Appendix

No. PD-0563-17

COURT OF APPEALS CAUSE NO. 03-15-00332-CR

TERRI REGINA LANG	§
	§
vs.	§
	§
STATE OF TEXAS	§

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TAB ONE

(1)

2007 Legislative History

TAB ONE-ONE

(1.1)

House Committee Report Bill
Analysis for H.B. 3584

BILL ANALYSIS

C.S.H.B. 3584
By: Pena
Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Organized retail crime is distinct from petty shoplifting in that it involves professional theft rings that move quickly from community to community and across county lines to steal large amounts of merchandise. This criminal activity requires many thieves (boosters) organized by a central figure (fence) that pays the boosters pennies on the dollar, then repackages and resells the merchandise through alternate distribution channels to the general public. Nationally, the FBI estimates that monetary loss due to theft attributable to organized retail crime is $37 billion annually. The Food Marketing Institute estimates that Texas businesses annually lose over $2.5 billion and the state loses over $150 million in sales tax revenue.

C.S.H.B. 3584 creates a new offense of Organized Retail Theft and sets out penalties for the offense.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

The Committee Substitute to House Bill 3584 amends Chapter 31, Penal Code, by adding Section 31.16 to create the offense of organized retail theft. "Retail merchandise" means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment. A person commits an offense of organized retail theft if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of stolen retail merchandise or merchandise explicitly represented to the person as being stolen retail merchandise with a total value of not less than $1,500.

An offense under organized retail theft is a state jail felony if the total value of the merchandise involved is $1,500 or more but less than $20,000; a felony of the third degree if the total value is $20,000 or more but less than $100,000; a felony of the second degree if the total value is $100,000 or more but less than $200,000; or a felony of the first degree if the total value is $200,000 or more. An offense is increased to the next higher category of offense if it is shown that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described under Section 31.16(b), Penal Code.

The bill amends Article 13.08, Code of Criminal Procedure, by providing that the offense can be prosecuted in any county where the underlying theft could have been prosecuted as a separate offense.

EFFECTIVE DATE

September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 3584 adds the word "intentionally," and provides that the person commits an offense of organized retail theft if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of stolen retail

merchandise or merchandise explicitly represented to the person as being stolen retail merchandise with a total value of not less than $1,500. Additionally, the substitute removes the misdemeanor offenses under organized retail theft.

TAB ONE-TWO

(1.2)

House Research Organizations
Bill Analysis for H.B. 3584

SUBJECT: Creation of the offense of organized retail theft

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 5 ayes — Peña, Vaught, Riddle, Escobar, Mallory Caraway

0 nays

4 absent — Hodge, Moreno, Pierson, Talton

WITNESSES: For — Calvin Erves, Albertsons LLC; Tommy Hudspeth, Irving Police Dept.; Karl Langhorst, Tom Thumb Food Markets; (*Registered, but did not testify:* Doug DuBois, Texas Petroleum Marketers and Convenience Store Assoc.; Jay Howard, Wal-Mart Stores; Nathan Latsha, Stage Stores; Brad Shields, Texas Retailers Assoc.; Charlie Tyner, Kroger Co.)

Against — None

On — (*Registered, but did not testify:* Shannon Edmonds, Texas District and County Attorneys Assn.)

DIGEST: CSHB 3584 would add Penal Code, sec. 31.16, to create the crime of organized retail theft, which a person would commit by intentionally conducting, promoting, or facilitating an activity in which the person received, possessed, concealed, stored, bartered, sold, or disposed of at least $1,500 worth of:

- stolen retail merchandise; or
- merchandise explicitly represented to the person as being stolen retail merchandise.

Retail merchandise would mean one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment.

The punishment for organized retail theft would depend on the value of the merchandise involved as follows:

- a state-jail felony (180 days to two years in a state jail and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $1,500 but less than $20,000;
- a third-degree felony (two to 10 years in prison and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $20,000 but less than $100,000.
- a second-degree felony (two to 20 years in prison and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $100,000 but less than $200,000; or
- a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to $10,000) if the total value of the merchandise involved was $200,000 or more.

The punishment would be increased to the next penalty category if it was shown that the defendant organized, supervised, financed, or managed one or more persons engaged in receiving, possessing, concealing, storing, bartering, selling, or disposing of stolen retail merchandise or merchandise explicitly represented to the person as being stolen retail merchandise.

The bill would amend Code of Criminal Procedure, art. 13.08 to allow the crime of organized retail theft to be prosecuted in any county in which the underlying theft could be prosecuted as a separate offense.

The bill would take effect on September 1, 2007.

SUPPORTERS SAY:

CSHB 3584 would combat the growth of organized retail theft, in which groups of shoplifters and fences form multi-state crime rings that cost retailers millions of dollars a year in stolen goods. The bill would weaken these organized rings by targeting the fences who hold the syndicates together. If the public could effectively prosecute and incarcerate these key players, then shoplifters would have difficulty selling stolen merchandise and would be discouraged from shoplifting in the future.

Current theft laws are inadequate because they penalize individual transfers of stolen merchandise. Fences convicted today are out on the street and active again in a few years because of the relatively small value of individual transactions. CSHB 3584's penalty ladder would allow the value of transactions to be aggregated and thus ensure that fences served sentences long enough to permanently shut down their businesses and cause organized crime rings to collapse. In addition, the penalty

enhancement for fences who oversaw other fences would serve as yet another blow to the organizational efforts of these criminals.

OPPONENTS SAY:

CSHB 3584 proposes to create a new crime that simply would enhance penalties for actions that already are criminal under the existing theft, conspiracy, and accomplice statutes. Texas cannot afford to enhance criminal penalties and create new crimes because this would lead to more offenders serving longer sentences in prisons that already are full and understaffed.

TAB TWO

(2)

2011 Legislative History

TAB TWO-ONE

(2.1)

Senate Research Center Bill
Analysis for H.B. 2482

BILL ANALYSIS

Senate Research Center
82R7885 MAW-F

H.B. 2482
By: Pena et al. (Williams)
Criminal Justice
5/9/2011
Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Organized Retail Crime (ORC) is the orchestrated scheme to convert stolen goods to cash. It can generally be described as professional burglars, boosters, cons, thieves, fences and resellers conspiring to steal and sell retail merchandise obtained from retail establishments by theft or deception.

The term "booster," referring to a front line thief who steals with the intention of reselling the stolen goods, was created as a new definition. It is not uncommon for a booster group to work from city to city or across state lines taking several thousand dollars of goods a day. Boosters coordinate with "fences," the first buyers of the stolen goods, who typically purchase the items for pennies on the dollar. Fences may sell the items outright at flea markets, convenience stores, or online or they repackage them for sale to higher level fences. Associated problems include negative economic impact, safety issues for unsuspecting consumers and employees, concern for the Federal Bureau of Investigation (FBI) and state law enforcement of potential links to other criminal enterprises, human trafficking, traditional street gangs, drugs, money laundering, identity theft, and credit card fraud.

There are many challenges on the road to combating organized retail theft. Lack of available resources to state and local police departments, who have the primary responsibility for investigating most retail crimes, is a huge hurdle. Sharing information between public and private enterprise is another.

United States Immigration and Customs Enforcement and the FBI realize that ORC is best combated through statutes that carry severe penalties; therefore, H.B. 2482 seeks to combat ORC in Texas.

H.B. 2482 targets the patterns of these crimes committed by corrupt enterprises by allowing the major players and ring leaders to be held accountable. This bill makes it a crime to receive the stolen goods; intentionally conduct, promote, or facilitate the corrupt activity; or be employed by or associated with the enterprise by engaging in the activity

These criminal groups are also particularly nimble—able to easily change their appearance, alter their method of operation, and particularly adept at circumventing security devices and procedures.

The large dollar losses typically occur through the fire exits, as criminals stage hundreds and sometimes thousands of dollars worth of high dollar merchandise, typically at the back of the store and have their accomplice drive around the building, either communicating with walkie-talkies or cell phones, and then break out the exit to the waiting vehicle, which takes 10 to 20 seconds to load the merchandise and escape undetected. A typical shoplift would be approximately $200, where a theft committed through fire exits range from $1,000 to $6,000. The more time they have, typically the more they steal. Current law does not address the disabling of fire exit alarms. It only addresses setting off an alarm as a distraction, which is rarely the case. It does happen, however typically criminals cut the electrical wiring on fire exit devices, and/or punch out the speakers, with an awl, or similar tool, to the fire exit alarm, so it will not sound, and therefore allowing them to not be detected.

H.B. 2482 gives retailers, law enforcement and prosecutors the tools they need to help protect society from ORC.

H.B. 2482 amends current law relating to the prosecution of and punishment for certain offenses involving theft.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 31.01, Penal Code, by adding Subdivisions (11) through (14) to define "retail merchandise," "retail theft detector," "shielding or deactivation instrument," and "fire exit alarm."

SECTION 2. Amends Section 31.03(f), Penal Code, to provide that an offense described for purposes of punishment by Subsections (e)(1)-(e)(6) (providing, respectively, that an offense under this section is classified as either a Class C misdemeanor, Class B misdemeanor, Class A misdemeanor, state fail felony, a felony of the third degree, or felony of the second degree) is increased to the next higher category of offense if it is shown on the trial of the offense that during the commission of the offense, the actor intentionally, knowingly, or recklessly caused a fire exit alarm to sound or otherwise become activated, deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding, or used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector. Makes a nonsubstantive change.

SECTION 3. Amends Sections 31.16(b), (c), and (d), Penal Code, as follows:

(b) Provides that a person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of stolen retail merchandise, or merchandise explicitly represented to the person as being stolen retail merchandise, rather than a total value of not less than $1,500 of stolen retail merchandise or merchandise explicitly represented to the person as being stolen retail merchandise.

(c) Provides that an offense under this section is:

(1) a Class B misdemeanor if the total value of the merchandise involved in the activity is less than $50;

(2) a Class A misdemeanor if the total value of the merchandise involved in the activity is $50 or more but less than $500;

(3) a state fail felony if the total value of the merchandise involved in the activity is $500 or more but less than $1,500, rather than $1,500 or more but less than $20,000;

(4) a felony of the third degree if the total value of the merchandise involved in the activity is $1,500 or more but less than $20,000, rather than $20,000 or more but less than $100,000;

(5) a felony of the second degree if the total value of the merchandise involved in the activity is $20,000 or more but less than $100,000, rather than $100,000 or more but less than $200,000; or

(6) a felony of the first degree if the total value of the merchandise involved in the activity is $100,000 or more, rather than $200,000 or more.

Makes nonsubstantive changes.

(d) Provides than an offense described for purposes of punishment by Subsections (c)(1)-(5) is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b); or

(2) during the commission of the offense, a person engaged in an activity described by Subsection (b) intentionally, knowingly, or recklessly:

(A) caused a fire exit alarm to sound or otherwise become activated;

(B) deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or

(C) used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

SECTION 4. Repealers: Sections 31.15(a) (defining "retail theft detector" and "shielding or deactivation instrument"), 31.16(a) (defining "retail merchandise"), and 31.16(e) (providing that, for the purposes of punishment, an offense under this section or an offense described by Section 31.03(e)(1) or (2) is increased to the next highest category of offense if it is shown at the trial of the offense that the defendant, with the intent that a distraction from the commission of the offense be created, intentionally, knowingly, or recklessly caused an alarm to sound or otherwise become activated during the commission of the offense), Penal Code.

SECTION 5. Makes application of this Act prospective.

SECTION 6. Effective date: September 1, 2011.

TAB TWO-TWO

(2.2)

House Committee Report Bill
Analysis for H.B. 2482

BILL ANALYSIS

C.S.H.B. 2482
By: Pena
Criminal Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Observers note that individuals committing the offense of organized retail theft often deactivate a fire exit alarm or an anti-theft device used to protect retail merchandise, and the observers assert that statutory provisions related to this offense do not adequately address this issue. Interested parties contend that organized criminal enterprises, including gangs and foreign nationals, are often behind organized retail theft crimes and that these crimes have been linked to the funding of domestic and international terrorism, drugs, guns, prostitution, and human smuggling. The interested parties believe that Texas must impose stronger punishment and penalties on these large-scale organized retail thefts because they lead to retail business losses and closings, the loss of jobs, and the loss of sales tax revenue, which in turn will have a devastating effect on Texas' economy.

C.S.H.B. 2482 seeks to remedy this issue by enhancing certain penalties and punishment relating to certain theft crimes.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2482 amends the Penal Code to expand the circumstances under which a theft offense ranging from a Class C misdemeanor to a second degree felony, based on the value of the property stolen, is increased to the next higher category of offense for punishment purposes to include a showing on the trial of the offense that the actor, during the commission of the offense, intentionally, knowingly, or recklessly caused a fire exit alarm to sound or otherwise become activated, deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding, or used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

C.S.H.B. 2482 removes from the conditions that constitute the offense of organized retail theft the requirement that the stolen merchandise be valued at not less than $1,500. The bill makes the offense of organized retail theft a Class B misdemeanor if the total value of the merchandise involved in the activity is less than $50 or a Class A misdemeanor if the total value of the merchandise involved in the activity is $50 or more but less than $500. The bill makes such an offense a state jail felony if the total value of the merchandise involved in the activity is $500 or more but less than $1,500, rather than $1,500 or more but less than $20,000. The bill makes such an offense a third degree felony if the total value of the merchandise involved in the activity is $1,500 or more but less than $20,000, rather than $20,000 or more but less than $100,000. The bill makes such an offense a second degree felony if the total value of the merchandise involved in the activity is $20,000 or more but less than $100,000, rather than $100,000 or more but less than $200,000. The bill makes such an offense a first degree felony if the total value of the merchandise involved in the activity is $100,000 or more, rather than $200,000 or more.

C.S.H.B. 2482 increases an offense of organized retail theft to the next highest category of offense for punishment purposes if it is shown on the trial of the offense that the defendant, during the commission of the offense, intentionally, knowingly, or recklessly caused a fire exit alarm to sound or otherwise become activated, deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding, or used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector. The bill makes conforming and nonsubstantive changes.

C.S.H.B. 2482 defines "retail merchandise," "retail theft detector," and "shielding or deactivation instrument" and provides for the meaning of "fire exit alarm" by reference to the Health and Safety Code.

C.S.H.B. 2482 repeals the following provisions of the Penal Code:

- Section 31.15(a), defining "retail theft detector" and "shielding or deactivation instrument"
- Section 31.16(a), defining "retail merchandise"
- Section 31.16(e), increasing an offense of organized retail theft or a Class A or Class B misdemeanor theft offense to the next highest category of offense for punishment purposes if it is shown at trial that the defendant, with the intent that a distraction from the commission of the offense be created, intentionally, knowingly, or recklessly caused an alarm to sound or otherwise become activated during the commission of the offense

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2482 differs from the original by repealing the definitions of "retail merchandise," "retail theft detector," and "shielding or deactivation instrument" in statutory provisions relating to organized retail theft and instruments used in such theft and defining those terms in statutory provisions relating to theft, whereas the original retains the repealed definitions and references those terms in statutory provisions relating to organized retail theft. The substitute differs from the original by referencing the meaning of "fire exit alarm" in statutory provisions relating to theft, whereas the original references the meaning of that term in statutory provisions relating to organized retail theft.

C.S.H.B. 2482 contains a provision not included in the original expanding the circumstances under which a theft offense ranging from a Class C misdemeanor to a second degree felony, based on the value of the property stolen, is increased to the next higher category of offense for punishment purposes if it is shown on trial that the actor intentionally, knowingly, or recklessly caused a fire exit alarm to sound or become activated, deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding, or used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

C.S.H.B. 2482 omits provisions included in the original defining "boost" and expanding the conditions that constitute the offense of organized retail theft to include boosting one or more items of retail merchandise from a single retail establishment or multiple retail establishments in a certain manner.

C.S.H.B. 2482 differs from the original by making the offense of organized retail theft a Class B misdemeanor if the total value of the merchandise involved in the activity is less than $50, whereas the original specifies a total value of less than $500. The substitute differs from the original by making the offense of organized retail theft a Class A misdemeanor if that total

value is $50 or more but less than $500, whereas the original specifies a total value of $500 or more but less than $1,500.

C.S.H.B. 2482 differs from the original by changing the threshold amounts of merchandise involved in the offense of organized retail theft that make the offense a state jail felony, third degree felony, second degree felony, and first degree felony, whereas the original does not change the threshold amount. The substitute contains a provision not included in the original enhancing an offense of organized retail theft to the next higher category of offense if it is shown on the trial of the offense that the actor performed certain actions relating to alarms and detectors.

C.S.H.B. 2482 differs from the original by increasing an offense of organized retail theft ranging from a Class C misdemeanor to a second degree felony, based on the value of the property stolen, to the next higher category of offense for punishment purposes if it is shown on trial that the actor, during the commission of the offense, intentionally, knowingly, or recklessly caused a fire exit alarm to sound or otherwise become activated, deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding, or used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector, whereas the original increases those organized retail theft offenses or a Class C or Class B misdemeanor theft offense to the next highest category of offense for punishment purposes if it is shown at trial that the defendant engaged in that same conduct during the commission of the offense.

C.S.H.B. 2482 differs from the original by repealing a provision increasing an offense of organized retail theft or a Class A or Class B misdemeanor theft offense to the next highest category of offense for punishment purposes if it is shown at trial that the defendant, with the intent that a distraction from the commission of the offense be created, intentionally, knowingly, or recklessly caused an alarm to sound or otherwise become activated during the commission of the offense, whereas the original retains that provision and incorporates into the provision other conduct relating to deactivating or preventing a fire exit alarm from sounding and using a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

TAB TWO-THREE

(2.3)

House Research Organization
Bill Analysis for H.B. 2482

SUBJECT: Increasing and revising penalties for organized retail theft

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 7 ayes — Gallego, Aliseda, Burkett, Carter, Y. Davis, Rodriguez, Zedler

0 nays

2 absent — Hartnett, Christian

WITNESSES: For — Mike Battles, Stage Stores, Inc.; Anthony Sheppard, CVS/Caremark; David Williams, Hobby Lobby Corporation (*Registered, but did not testify:* Stephanie Gibson, Texas Retailers Association; Brad Shields, Texas Federation of Drug Stores; John Chancellor, Texas Police Chiefs Association; Lon Craft, Texas Municipal Police Association; Randy Erben, The Home Depot; Karen Reagan, Walgreen Co.; Jessica Sloman, Houston Police Department)

Against — None

BACKGROUND: Under Penal Code, sec. 31.16, a person commits the offense of organized retail theft by intentionally conducting, promoting, or facilitating an activity in which the person received, possessed, concealed, stored, bartered, sold, or disposed of at least $1,500 worth of:

- stolen retail merchandise; or
- merchandise explicitly represented to the person as being stolen retail merchandise.

Retail merchandise means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment. The punishment for organized retail theft depends on the value of the merchandise, as follows:

- a state-jail felony (180 days to two years in a state jail and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $1,500 but less than $20,000;

- a third-degree felony (two to 10 years in prison and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $20,000 but less than $100,000;
- a second-degree felony (two to 20 years in prison and an optional fine of up to $10,000) if the total value of the merchandise involved was at least $100,000 but less than $200,000; or
- a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to $10,000) if the total value of the merchandise involved was $200,000 or more.

The punishment is increased to the next penalty category if it was shown that the defendant organized, supervised, financed, or managed one or more persons engaged in organized retail theft.

The punishment under this offense also is increased to the next penalty category if the defendant intentionally, knowingly, or recklessly caused an alarm to sound with the intent to distract from the offense.

DIGEST:

CSHB 2482 would remove the minimum threshold value of $1500 for the offense of organized retail theft and create a class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000) if the total value of the merchandise involved was less than $50 and a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000) if the total value of the merchandise involved was at least $50 but less than $500. The rest of the value ladder would be modified as follows:

- a state-jail felony if the total value of the merchandise involved was at least $500 but less than $1,500;
- a third-degree felony if the total value of the merchandise involved was at least $1,500 but less than $20,000;
- a second-degree felony if the total value of the merchandise involved was at least $20,000 but less than $100,000; or
- a first-degree felony if the total value of the merchandise involved was $100,000 or more.

The punishment would be increased to the next penalty category under the general theft offense in Penal Code, sec. 31.03 or under the organized retail theft offense in Penal Code, sec. 31.16 if it was shown that the defendant intentionally, knowingly, or recklessly:

- caused a fire exit alarm to sound or otherwise become activated;
- deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or
- used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

The bill would use the definition of "fire exit alarm" from the Health and Safety Code and would repeal current law on sounding an alarm with the intent to distract. It also would move the definitions of "retail merchandise," "retail theft detector," and "shielding or deactivation instrument" to sec. 31.01 of the Penal Code, where other general definitions for the theft chapter are located.

The bill would take effect September 1, 2011, and would apply only to offenses committed on or after that date.

SUPPORTERS SAY:

CSHB 2482 would strengthen the tools used to combat organized retail theft, which costs retailers in Texas about $2.2 billion every year and costs the state about $138 million a year in sales tax revenue. Creating misdemeanor charges for organized retail theft under $500 and lowering the value ladder on all felony charges would provide the stiffer penalties that are warranted for this crime. Prosecutors currently do not use the organized retail theft statute frequently because the penalties are the same as for general theft.

The con artists who commit this crime are very aware of the current $1,500 threshold for organized retail theft and adroitly stay just beneath it, knowing that if they get caught they will get the equivalent of a traffic ticket and can keep stealing. These criminals consider this a low-risk and high-reward crime; they often steal $10,000 to $20,000 worth of merchandise in a single day. Making the penalties steeper would deter them from committing this serious crime.

Along the same lines, enhancing penalties when a criminal uses a booster bag, which is a bag lined with aluminum foil to block the signal from the theft protection tag, would be an effective and necessary deterrent. Criminals regularly roll up merchandise, such as jewelry, in a booster bag and walk out in less than 4 minutes with thousands of dollars worth of merchandise. Current law includes an offense for possessing a booster bag or deactivation device, but the penalty is just a flat class A misdemeanor. Using these devices also should result in an enhanced penalty, depending

on the value of the boosted or deactivated merchandise stolen, which CSHB 2482 would do.

CSHB 2482 also would clean up language in the law regarding an enhanced penalty for using a fire exit. Current law enhances the penalty if the defendant intended to set off the alarm as a distraction from committing the offense, but in reality, criminals use the fire exit to leave quickly with the merchandise. CSHB 2482 would make it clear that the enhanced penalty applied under the general theft statute or the organized retail theft statute if the criminal sets off or deactivates the fire alarm in the commission of the crime.

Prosecutors would be able to tell the difference between wayward juveniles and the hardened and dangerous organized criminals that use organized retail theft to enrich their criminal enterprises. Depending on the case, prosecutors could charge under the general theft statute or the organized retail theft statute with higher penalties.

OPPONENTS SAY:

CSHB 2482 should not remove the minimum threshold of $1,500 for the offense of organized retail theft. The bill would make every low-level shoplifting theft at least a class B misdemeanor, which could result in jail time. Under the general theft statute, stealing something worth less than $50 currently is a class C misdemeanor (maximum fine of $500). Some thefts are just petty thefts and should be punished as such, which was why the $1,500 minimum threshold for the offense of organized retail theft was created in the first place.

While many groups related to organized retail theft are connected to gangs or other nefarious criminals, the lower threshold and enhanced penalties of CSHB 2482 could trap groups of wayward juveniles for organized retail theft, which would not be a just result. CSHB 2482 should not enhance the penalties for organized retail theft because enhancement would not be an effective deterrent and could be costly for the correctional system.

NOTES:

The committee substitute would:

- eliminate a definition of "boost" that was included in the original bill under the organized retail theft statute;
- modify the penalties for organized retail theft of merchandise valued above $1,500, whereas the original bill would not;

- establish class B and class A misdemeanors for organized retail theft for merchandise valued at different amounts than in the original bill; and
- add higher penalties for using the fire exit or using shielding or deactivation devices to both the organized retail theft and general theft statutes, whereas the original bill added them only to the organized retail theft statute.

The companion bill, SB 388 by Williams, was referred to the Senate Criminal Justice Committee on February 2.

TAB THREE

(3)

Versions of Section 31.16

TAB THREE-ONE

(3.1)

2007 Version

2007 Tex. Sess. Law Serv. Ch. 1274 (H.B. 3584) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 2007
Eightieth Legislature, 2007 Regular Session

Additions are indicated by Text; deletions by
~~Text~~ . Changes in tables are made but not highlighted.

CHAPTER 1274
H.B. No. 3584
PROSECUTION AND PUNISHMENT OF CERTAIN THEFT OFFENSES

AN ACT relating to the prosecution and punishment of certain theft offenses.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Chapter 31, Penal Code, is amended by adding Section 31.16 to read as follows:

<< TX PENAL § 31.16 >>

Sec. 31.16. ORGANIZED RETAIL THEFT. (a) In this section, "retail merchandise" means one or more items of tangible personal property displayed, held, stored, or offered for sale in a retail establishment.

(b) A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of a total value of not less than $1,500 of:

(1) stolen retail merchandise; or

(2) merchandise explicitly represented to the person as being stolen retail merchandise.

(c) An offense under this section is:

(1) a state jail felony if the total value of the merchandise involved in the activity is $1,500 or more but less than $20,000;

(2) a felony of the third degree if the total value of the merchandise involved in the activity is $20,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the merchandise involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the merchandise involved in the activity is $200,000 or more.

(d) An offense described for purposes of punishment by Subsections (c)(1)–(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(e) For the purposes of punishment, an offense under this section or an offense described by Section 31.03(e)(1) or (2) is increased to the next highest category of offense if it is shown at the trial of the offense that the defendant, with the intent that a distraction from the commission of the offense be created, intentionally, knowingly, or recklessly caused an alarm to sound or otherwise become activated during the commission of the offense.

SECTION 2. Article 13.08, Code of Criminal Procedure, is amended to read as follows:

<< TX CRIM PRO Art. 13.08 >>

Art. 13.08. THEFT; ORGANIZED RETAIL THEFT. (a) Where property is stolen in one county and removed by the offender to another county, the offender may be prosecuted either in the county where he took the property or in any other county through or into which he may have removed the same.

(b) An offense under Section 31.16, Penal Code, may be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense.

<< Note: TX PENAL § 31.16 >>

SECTION 3. The change in law made by this Act in adding Section 31.16(e), Penal Code, applies only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect at the time the offense was committed, and the former law is continued in effect for that purpose. For the purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

SECTION 4. This Act takes effect September 1, 2007.

Passed by the House on May 11, 2007: Yeas 138, Nays 0, 2 present, not voting; the House concurred in Senate amendments to H.B. No. 3584 on May 25, 2007: Yeas 141, Nays 0, 2 present, not voting; passed by the Senate, with amendments, on May 23, 2007: Yeas 30, Nays 0.

Approved June 15, 2007.

Effective September 1, 2007.

TX LEGIS 1274 (2007)

End of Document

TAB THREE-TWO

(3.2)

2011 Version

(A) an elderly individual; or

(B) a nonprofit organization; [~~or~~]

(4) the actor was a Medicare provider in a contractual relationship with the federal government at the time of the offense and the property appropriated came into the actor's custody, possession, or control by virtue of the contractual relationship; **or**

(5) during the commission of the offense, the actor intentionally, knowingly, or recklessly:

(A) caused a fire exit alarm to sound or otherwise become activated;

(B) deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or

(C) used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

SECTION 3. Sections 31.16(b), (c), and (d), Penal Code, are amended to read as follows:

<< TX PENAL § 31.16 >>

(b) A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of [~~a total value of not less than $1,500 of~~]:

(1) stolen retail merchandise; or

(2) merchandise explicitly represented to the person as being stolen retail merchandise.

(c) An offense under this section is:

(1) a Class B misdemeanor if the total value of the merchandise involved in the activity is less than $50;

(2) a Class A misdemeanor if the total value of the merchandise involved in the activity is $50 or more but less than $500;

(3) a state jail felony if the total value of the merchandise involved in the activity is **$500** [~~$1,500~~] or more but less than **$1,500** [~~$20,000~~];

(4) [~~(2)~~]a felony of the third degree if the total value of the merchandise involved in the activity is **$1,500** [~~$20,000~~] or more but less than **$20,000** [~~$100,000~~];

(5) [~~(3)~~]a felony of the second degree if the total value of the merchandise involved in the activity is **$20,000** [~~$100,000~~] or more but less than **$100,000** [~~$200,000~~]; or

(6) [~~(4)~~]a felony of the first degree if the total value of the merchandise involved in the activity is **$100,000** [~~$200,000~~] or more.

(d) An offense described for purposes of punishment by Subsections **(c)(1)–(5)** [~~(c)(1)–(3)~~] is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b); **or**

(2) during the commission of the offense, a person engaged in an activity described by Subsection (b) intentionally, knowingly, or recklessly:

(A) caused a fire exit alarm to sound or otherwise become activated;

(B) deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or

(C) used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

<< TX PENAL § 31.15 >>

<< TX PENAL § 31.16 >>

SECTION 4. Sections 31.15(a) and 31.16(a) and (e), Penal Code, are repealed.

<< Note: TX PENAL § 31.01 >>

SECTION 5. The changes in law made by this Act apply only to an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. For purposes of this section, an offense was committed before the effective date of this Act if any element of the offense occurred before that date.

SECTION 6. This Act takes effect September 1, 2011.

Passed by the House on April 27, 2011: Yeas 148, Nays 0, 2 present, not voting; passed by the Senate on May 19, 2011: Yeas 31, Nays 0.

Approved June 17, 2011.
Effective September 1, 2011.

End of Document

TAB THREE-THREE

(3.3)

VERSION AS OF FILING OF BRIEF IN THE COURT OF APPEALS

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Penal Code (Refs & Annos)
Title 7. Offenses Against Property (Refs & Annos)
Chapter 31. Theft (Refs & Annos)

V.T.C.A., Penal Code § 31.16

§ 31.16. Organized Retail Theft

Effective: September 1, 2015
Currentness

(a) Repealed by Acts 2011, 82nd Leg., ch. 323 (H.B. 2482), § 4.

(b) A person commits an offense if the person intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, or disposes of:

(1) stolen retail merchandise; or

(2) merchandise explicitly represented to the person as being stolen retail merchandise.

(c) An offense under this section is:

(1) a Class C misdemeanor if the total value of the merchandise involved in the activity is less than $100;

(2) a Class B misdemeanor if the total value of the merchandise involved in the activity is $100 or more but less than $750 ;

(3) a Class A misdemeanor if the total value of the merchandise involved in the activity is $750 or more but less than $2,500 ;

(4) a state jail felony if the total value of the merchandise involved in the activity is $2,500 or more but less than $30,000 ;

(5) a felony of the third degree if the total value of the merchandise involved in the activity is $30,000 or more but less than $150,000 ;

(6) a felony of the second degree if the total value of the merchandise involved in the activity is $150,000 or more but less than $300,000 ; or

(7) a felony of the first degree if the total value of the merchandise involved in the activity is $300,000 or more.

(d) An offense described for purposes of punishment by Subsections (c)(1)-(6) is increased to the next higher category of offense if it is shown on the trial of the offense that:

(1) the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b); or

(2) during the commission of the offense, a person engaged in an activity described by Subsection (b) intentionally, knowingly, or recklessly:

(A) caused a fire exit alarm to sound or otherwise become activated;

(B) deactivated or otherwise prevented a fire exit alarm or retail theft detector from sounding; or

(C) used a shielding or deactivation instrument to prevent or attempt to prevent detection of the offense by a retail theft detector.

(e) Repealed by Acts 2011, 82nd Leg., ch. 323 (H.B. 2482), § 4.

Credits

Added by Acts 2007, 80th Leg., ch. 1274, § 1, eff. Sept. 1, 2007. Amended by Acts 2011, 82nd Leg., ch. 323 (H.B. 2482), §§ 3, 4, eff. Sept. 1, 2011; Acts 2015, 84th Leg., ch. 1251 (H.B. 1396), § 13, eff. Sept. 1, 2015.

Notes of Decisions (1)

V. T. C. A., Penal Code § 31.16, TX PENAL § 31.16
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

TAB FOUR

(4)

Materials on Cargo Theft Statute

TAB FOUR-ONE

(4.1)

Senate Research Center Bill
Analysis for S.B. 1828
[Introduced Version]

BILL ANALYSIS

Senate Research Center
84R932 JRR-F

S.B. 1828
By: Zaffirini
Criminal Justice
4/20/2015
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Cargo theft by organized crime rings has become a very serious problem in this state. By some estimates, Texas leads the nation in the incidence of cargo theft, with losses valued at $23 million between 2012 and 2014. Furthermore, existing Penal Code provisions addressing theft and organized crime present significant impediments to the prosecution of this activity. For example, an element of the crime of theft is the appropriation of property without the owner's effective consent. In cargo theft cases involving collusive drivers, however, the initial bailment of the property is consented to by the owner, making it difficult to establish at what point the driver's conduct vitiates the owner's consent for purposes of charging theft. This bill would remedy that problem by creating a separate category of offense called "cargo theft" and providing that failure to deliver cargo to its destination as contracted, or causing the seal to be broken on a vehicle containing the cargo, completes the offense, subject to general mens rea provisions.

Another impediment to prosecuting cargo theft under current law results from the fact that most cargo theft is undertaken by sophisticated, organized crime rings. Under current law, a person found in possession of stolen property may be prosecuted individually, but to reach others involved in the theft under Texas' organized crime statue would require the prosecutor to establish a "combination" of "three or more persons who collaborate in carrying on criminal activities"—a very difficult showing to make. What's more, under the standard punishment "ladder" for theft, low-value thefts can be prosecuted as misdemeanors. While this might be a suitable deterrent for amateur or opportunistic criminals, it is radically under-deterrent against organized crime syndicates that employ expendable "pawns." This bill would address both issues by making any theft of cargo a state jail felony at a minimum, and up to a first degree felony for thefts of $200,000 or more, and by providing that anyone who "conducts, promotes, or facilitates an activity" involving the receipt, possession, concealment, storage, sale, or abandonment of stolen cargo is guilty of the offense of cargo theft.

As proposed, S.B. 1828 amends current law relating to the creation of the offense of cargo theft.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Article 13.08, Code of Criminal Procedure, to read as follows:

Art. 13.08. THEFT; ORGANIZED RETAIL THEFT; CARGO THEFT.

SECTION 2. Amends Article 13.08(b), Code of Criminal Procedure, to authorize an offense under Section 31.16 (Organized Retail Theft) or 31.18, Penal Code, to be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense.

SECTION 3. Amends Chapter 31, Penal Code, by adding Section 31.18, as follows:

Sec. 31.18. CARGO THEFT. (a) Defines "cargo" and "vehicle" in this section.

(b) Provides that a person commits an offense if the person:

(1) conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo; or

(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1):

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo.

(c) Provides that an offense under this section is:

(1) a state jail felony if the total value of the cargo involved in the activity is less than $10,000;

(2) a felony of the third degree if the total value of the cargo involved in the activity is $10,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the cargo involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the cargo involved in the activity is $200,000 or more.

(d) Provides that, for purposes of Subsection (c), the total value of the cargo involved in the activity includes the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution.

(e) Provides that an offense described for purposes of punishment by Subsections (c)(1)-(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(f) Provides that it is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of:

(A) an undercover operative or peace officer; or

(B) a bait vehicle;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense but would not encourage a person not predisposed to commit the offense.

SECTION 4. Effective date: September 1, 2015.

TAB FOUR-TWO

(4.2)

Senate Research Center Bill Analysis for S.B. 1828

[Senate Committee Report]

BILL ANALYSIS

Senate Research Center
84R21658 JRR-F

C.S.S.B. 1828
By: Zaffirini
Criminal Justice
4/22/2015
Committee Report (Substituted)

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Cargo theft by organized crime rings has become a very serious problem in this state. By some estimates, Texas leads the nation in the incidence of cargo theft, with losses valued at $23 million between 2012 and 2014. Furthermore, existing Penal Code provisions addressing theft and organized crime present significant impediments to the prosecution of this activity. For example, an element of the crime of theft is the appropriation of property without the owner's effective consent. In cargo theft cases involving collusive drivers, however, the initial bailment of the property is consented to by the owner, making it difficult to establish at what point the driver's conduct vitiates the owner's consent for purposes of charging theft. This bill would remedy that problem by creating a separate category of offense called "cargo theft" and providing that failure to deliver cargo to its destination as contracted, or causing the seal to be broken on a vehicle containing the cargo, completes the offense, subject to general mens rea provisions.

Another impediment to prosecuting cargo theft under current law results from the fact that most cargo theft is undertaken by sophisticated, organized crime rings. Under current law, a person found in possession of stolen property may be prosecuted individually, but to reach others involved in the theft under Texas' organized crime statue would require the prosecutor to establish a "combination" of "three or more persons who collaborate in carrying on criminal activities"—a very difficult showing to make. What's more, under the standard punishment "ladder" for theft, low-value thefts can be prosecuted as misdemeanors. While this might be a suitable deterrent for amateur or opportunistic criminals, it is radically under-deterrent against organized crime syndicates that employ expendable "pawns." This bill would address both issues by making any theft of cargo a state jail felony at a minimum, and up to a first degree felony for thefts of $200,000 or more, and by providing that anyone who "knowingly or intentionally conducts, promotes, or facilitates an activity" involving the receipt, possession, concealment, storage, sale, or abandonment of stolen cargo is guilty of the offense of cargo theft.

C.S.S.B. 1828 amends current law relating to the creation of the offense of cargo theft.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Article 13.08, Code of Criminal Procedure, to read as follows:

Art. 13.08. THEFT; ORGANIZED RETAIL THEFT; CARGO THEFT.

SECTION 2. Amends Article 13.08(b), Code of Criminal Procedure, to authorize an offense under Section 31.16 (Organized Retail Theft) or 31.18, Penal Code, to be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense.

SECTION 3. Amends Chapter 31, Penal Code, by adding Section 31.18, as follows:

Sec. 31.18. CARGO THEFT. (a) Defines "cargo" and "vehicle" in this section.

(b) Provides that a person commits an offense if the person:

(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo; or

(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1), knowingly or intentionally:

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo.

(c) Provides that an offense under this section is:

(1) a state jail felony if the total value of the cargo involved in the activity is less than $10,000;

(2) a felony of the third degree if the total value of the cargo involved in the activity is $10,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the cargo involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the cargo involved in the activity is $200,000 or more.

(d) Provides that, for purposes of Subsection (c), the total value of the cargo involved in the activity includes the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution.

(e) Provides that an offense described for purposes of punishment by Subsections (c)(1)-(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(f) Provides that it is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of:

(A) an undercover operative or peace officer; or

(B) a bait vehicle;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense but would not encourage a person not predisposed to commit the offense.

SECTION 4. Effective date: September 1, 2015.

TAB FOUR-THREE

(4.3)

House Committee Report Bill
Analysis for S.B. 1828

BILL ANALYSIS

S.B. 1828
By: Zaffirini
Criminal Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Interested parties assert that current law does not provide law enforcement with the tools necessary to stop organized cargo theft. The parties contend that typically the only person charged with an offense related to cargo theft is the person in possession of a stolen item but that many other people are often involved in the theft. Additionally, the parties express concern that there is not a clear, consistent understanding of the term cargo theft. S.B. 1828 seeks to address these issues.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

S.B. 1828 amends the Penal Code to create the offense of cargo theft for a person who knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of stolen cargo or cargo explicitly represented to the person as being stolen cargo; or for a person who is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate such an activity, knowingly or intentionally fails to deliver the entire cargo to the known point of destination as contracted or knowingly or intentionally causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo. The bill defines "cargo" as goods that constitute, wholly or partly, a commercial shipment of freight moving in commerce and specifies that a shipment is considered to be moving in commerce if the shipment is located at any point between the point of origin and the final point of destination regardless of any temporary stop that is made for the purpose of transshipment or otherwise.

S.B. 1828 establishes penalties for the offense ranging from a state jail felony to a first degree felony depending on the total value of the cargo involved in the activity, including the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution. The bill enhances the penalty for the offense, excluding a first degree felony, to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in conduct constituting the offense.

S.B. 1828 establishes that it is not a defense to prosecution that the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, that the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense, or that the actor was solicited by a peace officer in a certain specified manner to commit the offense.

S.B. 1828 amends the Code of Criminal Procedure to authorize the prosecution of a cargo theft offense in any county in which an underlying theft could have been prosecuted as a separate offense.

EFFECTIVE DATE

September 1, 2015.

TAB FOUR-FOUR

(4.4)

Senate Research Center Bill
Analysis for S.B. 1828

BILL ANALYSIS

Senate Research Center

S.B. 1828
By: Zaffirini
Criminal Justice
6/16/2015
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Cargo theft by organized crime rings has become a very serious problem in this state. By some estimates, Texas leads the nation in the incidence of cargo theft, with losses valued at $23 million between 2012 and 2014. Furthermore, existing Penal Code provisions addressing theft and organized crime present significant impediments to the prosecution of this activity. For example, an element of the crime of theft is the appropriation of property without the owner's effective consent. In cargo theft cases involving collusive drivers, however, the initial bailment of the property is consented to by the owner, making it difficult to establish at what point the driver's conduct vitiates the owner's consent for purposes of charging theft. This bill would remedy that problem by creating a separate category of offense called "cargo theft" and providing that failure to deliver cargo to its destination as contracted, or causing the seal to be broken on a vehicle containing the cargo, completes the offense, subject to general mens rea provisions.

Another impediment to prosecuting cargo theft under current law results from the fact that most cargo theft is undertaken by sophisticated, organized crime rings. Under current law, a person found in possession of stolen property may be prosecuted individually, but to reach others involved in the theft under Texas' organized crime statue would require the prosecutor to establish a "combination" of "three or more persons who collaborate in carrying on criminal activities"—a very difficult showing to make. What's more, under the standard punishment "ladder" for theft, low-value thefts can be prosecuted as misdemeanors. While this might be a suitable deterrent for amateur or opportunistic criminals, it is radically under-deterrent against organized crime syndicates that employ expendable "pawns." This bill would address both issues by making any theft of cargo a state jail felony at a minimum, and up to a first degree felony for thefts of $200,000 or more, and by providing that anyone who "knowingly or intentionally conducts, promotes, or facilitates an activity" involving the receipt, possession, concealment, storage, sale, or abandonment of stolen cargo is guilty of the offense of cargo theft.

S.B. 1828 amends current law relating to the creation of the offense of cargo theft.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Article 13.08, Code of Criminal Procedure, to read as follows:

Art. 13.08. THEFT; ORGANIZED RETAIL THEFT; CARGO THEFT.

SECTION 2. Amends Article 13.08(b), Code of Criminal Procedure, to authorize an offense under Section 31.16 (Organized Retail Theft) or 31.18, Penal Code, to be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense.

SECTION 3. Amends Chapter 31, Penal Code, by adding Section 31.18, as follows:

Sec. 31.18. CARGO THEFT. (a) Defines "cargo" and "vehicle" in this section.

(b) Provides that a person commits an offense if the person:

(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo; or

(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1), knowingly or intentionally:

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo.

(c) Provides that an offense under this section is:

(1) a state jail felony if the total value of the cargo involved in the activity is less than $10,000;

(2) a felony of the third degree if the total value of the cargo involved in the activity is $10,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the cargo involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the cargo involved in the activity is $200,000 or more.

(d) Provides that, for purposes of Subsection (c), the total value of the cargo involved in the activity includes the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution.

(e) Provides that an offense described for purposes of punishment by Subsections (c)(1)-(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(f) Provides that it is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of:

(A) an undercover operative or peace officer; or

(B) a bait vehicle;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense but would not encourage a person not predisposed to commit the offense to actually commit the offense.

SECTION 4. Effective date: September 1, 2015.

TAB FOUR-FIVE

(4.5)

Cargo Theft Statute

Vernon's Texas Statutes and Codes Annotated
Penal Code (Refs & Annos)
Title 7. Offenses Against Property (Refs & Annos)
Chapter 31. Theft (Refs & Annos)

V.T.C.A., Penal Code § 31.18

§ 31.18. Cargo Theft

Effective: September 1, 2015
Currentness

(a) In this section:

(1) "Cargo" means goods, as defined by Section 7.102, Business & Commerce Code, that constitute, wholly or partly, a commercial shipment of freight moving in commerce. A shipment is considered to be moving in commerce if the shipment is located at any point between the point of origin and the final point of destination regardless of any temporary stop that is made for the purpose of transshipment or otherwise.

(2) "Vehicle" has the meaning assigned by Section 541.201, Transportation Code.

(b) A person commits an offense if the person:

(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo; or

(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1), knowingly or intentionally:

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo.

(c) An offense under this section is:

(1) a state jail felony if the total value of the cargo involved in the activity is $1,500 or more but less than $10,000;

(2) a felony of the third degree if the total value of the cargo involved in the activity is $10,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the cargo involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the cargo involved in the activity is $200,000 or more.

(d) For purposes of Subsection (c), the total value of the cargo involved in the activity includes the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution.

(e) An offense described for purposes of punishment by Subsections (c)(1)-(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(f) It is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of:

(A) an undercover operative or peace officer; or

(B) a bait vehicle;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense but would not encourage a person not predisposed to commit the offense to actually commit the offense.

Credits

Added by Acts 2015, 84th Leg., ch. 1219 (S.B. 1828), § 3, eff. Sept. 1, 2015.

V. T. C. A., Penal Code § 31.18, TX PENAL § 31.18
Current through the end of the 2015 Regular Session of the 84th Legislature

End of Document

2015 Tex. Sess. Law Serv. Ch. 1219 (S.B. 1828) (VERNON'S)

VERNON'S TEXAS SESSION LAW SERVICE 2015

Eighty-Fourth Legislature, 2015 Regular Session

Additions are indicated by **Text**; deletions by ~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by **Text** .

CHAPTER 1219
S.B. No. 1828
CREATION OF THE OFFENSE OF CARGO THEFT

AN ACT
relating to the creation of the offense of cargo theft.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. The heading to Article 13.08, Code of Criminal Procedure, is amended to read as follows:

<< TX CRIM PRO Art. 13.08 hd. >>

Art. 13.08. THEFT; ORGANIZED RETAIL THEFT; **CARGO THEFT.**

SECTION 2. Article 13.08(b), Code of Criminal Procedure, is amended to read as follows:

<< TX CRIM PRO Art. 13.08 >>

(b) An offense under Section 31.16 **or 31.18**, Penal Code, may be prosecuted in any county in which an underlying theft could have been prosecuted as a separate offense.

SECTION 3. Chapter 31, Penal Code, is amended by adding Section 31.18 to read as follows:

<< TX PENAL § 31.18 >>

Sec. 31.18. CARGO THEFT. (a) In this section:

(1) "Cargo" means goods, as defined by Section 7.102, Business & Commerce Code, that constitute, wholly or partly, a commercial shipment of freight moving in commerce. A shipment is considered to be moving in commerce if the shipment is located at any point between the point of origin and the final point of destination regardless of any temporary stop that is made for the purpose of transshipment or otherwise.

(2) "Vehicle" has the meaning assigned by Section 541.201, Transportation Code.

(b) A person commits an offense if the person:

(1) knowingly or intentionally conducts, promotes, or facilitates an activity in which the person receives, possesses, conceals, stores, barters, sells, abandons, or disposes of:

(A) stolen cargo; or

(B) cargo explicitly represented to the person as being stolen cargo; or

(2) is employed as a driver lawfully contracted to transport a specific cargo by vehicle from a known point of origin to a known point of destination and, with the intent to conduct, promote, or facilitate an activity described by Subsection (b)(1), knowingly or intentionally:

(A) fails to deliver the entire cargo to the known point of destination as contracted; or

(B) causes the seal to be broken on the vehicle or on an intermodal container containing any part of the cargo.

(c) An offense under this section is:

(1) a state jail felony if the total value of the cargo involved in the activity is $1,500 or more but less than $10,000;

(2) a felony of the third degree if the total value of the cargo involved in the activity is $10,000 or more but less than $100,000;

(3) a felony of the second degree if the total value of the cargo involved in the activity is $100,000 or more but less than $200,000; or

(4) a felony of the first degree if the total value of the cargo involved in the activity is $200,000 or more.

(d) For purposes of Subsection (c), the total value of the cargo involved in the activity includes the value of any vehicle stolen or damaged in the course of the same criminal episode as the conduct that is the subject of the prosecution.

(e) An offense described for purposes of punishment by Subsections (c)(1)–(3) is increased to the next higher category of offense if it is shown on the trial of the offense that the person organized, supervised, financed, or managed one or more other persons engaged in an activity described by Subsection (b).

(f) It is not a defense to prosecution under this section that:

(1) the offense occurred as a result of a deception or strategy on the part of a law enforcement agency, including the use of:

(A) an undercover operative or peace officer; or

(B) a bait vehicle;

(2) the actor was provided by a law enforcement agency with a facility in which to commit the offense or with an opportunity to engage in conduct constituting the offense; or

(3) the actor was solicited to commit the offense by a peace officer, and the solicitation was of a type that would encourage a person predisposed to commit the offense to actually commit the offense but would not encourage a person not predisposed to commit the offense to actually commit the offense.

SECTION 4. This Act takes effect September 1, 2015.

Passed the Senate on April 29, 2015: Yeas 30, Nays 1; May 14, 2015, Senate refused to concur in House amendment and requested appointment of Conference Committee; May 20, 2015, House granted request of the Senate; May 29, 2015, Senate

adopted Conference Committee Report by the following vote: Yeas 29, Nays 2; passed the House, with amendment, on May 11, 2015: Yeas 135, Nays 2, one present not voting; May 20, 2015, House granted request of the Senate for appointment of Conference Committee; May 23, 2015, House adopted Conference Committee Report by the following vote: Yeas 140, Nays 0, two present not voting.

Approved June 19, 2015.
Effective September 1, 2015.

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